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## Improvisational Unionism

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*Recent fights for a \$15-an-hour minimum wage at Walmart and in the fast-food industry have interested academics, captivated the press, and energized the public. For good reason. The campaigns upend conventional wisdom about what unions do (help workers win collective bargaining rights) and why they do it (build the membership). Scattered flash strikes for seemingly impossible or idiosyncratic goals on no obvious timeline have shattered that mold. Though much has already been said about these developments, scholarship has yet to provide a rigorous theoretical frame to categorize and explain the new form of activism. This Article argues that improvisation—long the engine of comedy and jazz but more recently a topic of serious academic inquiry—does both. Improvisational unionism is an intentional social practice that galvanizes courageous conduct, inspires new relationships, and, most importantly, spreads. It also functions as a legal strategy selected for its unique potential to unlock worker militancy amid law and*

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*institutional restrictions that have corroded labor's power for decades.*

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## INTRODUCTION

Though the steps used to win collective bargaining rights in the private sector have undergone some procedural innovations over the years, the essential script that unions have followed to marshal and mobilize workers in the first place has, more or less, remained the same. That the early stages of building support should be done quietly and in person are basic principles that every organizer would understand, almost instinctively.<sup>1</sup> That campaigns must meticulously track employee sentiment, usually on a one-to-five scale, so that the more public later phases are tied to surging support—ideally a hefty majority—is another.<sup>2</sup> So is the assumption that the strike, once labor’s most potent and respected organizing tool, is for all practical purposes a dead letter.<sup>3</sup> And the whole point of it all has long been taken for granted: yes, unions are broadly committed to better jobs and better working conditions, but ultimately, the conventional wisdom goes, they organize to get more members.<sup>4</sup>

However, in the fall of 2012, some things that felt genuinely *new* popped up on the organizing scene, as if somebody had decided to edit the script. On October 4, employees at a handful of Southern California Walmarts walked off the job and called for an end to retaliation against colleagues involved in Organization United for Respect at Walmart (OUR Walmart), a workplace advocacy organization founded by the United Food and Commercial Workers (UFCW) union.<sup>5</sup> The action had been foreshadowed by an earlier wage rally in Dallas and an Illinois demonstration that shut down a Walmart storage facility before being dispersed by riot police.<sup>6</sup> The strikes spread to twelve other states

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1. See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 665 (2010).

2. See Seth Newton Patel, Commentary, *Have We Built the Committee? Advancing Leadership Development in the U.S. Labor Movement*, 16 WORKINGUSA 113, 117 (2013).

3. See *infra* note 14. In a telling example, the *Labor Studies Journal* recently devoted an entire issue to the following debate: Interactive Issue, *The Strike: A Contemporary Lesson from Labor History or a Historical Artifact?*, 37 LAB. STUD. J. 337, 337–55 (Joe Berry ed., 2012).

4. At base, there are few other options. Union activity is primarily—often solely—funded by dues paid by members (and in certain states, nonmembers) who receive services in exchange for having the union as their exclusive bargaining agent. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1029–40 (2013).

5. Josh Eidelson, *Breaking: Wal-mart Workers on Strike, Defying Firings*, SALON (Oct. 4, 2013, 9:20 AM), [http://www.salon.com/2012/10/04/Walmart\\_workers\\_on\\_strike](http://www.salon.com/2012/10/04/Walmart_workers_on_strike) [http://perma.cc/Q5M4-LWNL].

6. *Id.*

five days later<sup>7</sup> and culminated in a hundred-city walkout on Black Friday<sup>8</sup> that, thanks to social media, spanned forty-six states.<sup>9</sup> A week later, two hundred workers from the Service Employees International Union's (SEIU) Fast Food Forward campaign struck dozens of New York City fast-food franchises.<sup>10</sup> This action came on the heels of the founding convention of "Fight for \$15," a Chicago-based offshoot of service workers who had partnered with OUR Walmart on Black Friday<sup>11</sup> and who would themselves strike the following April.<sup>12</sup>

These events and many others released a crush of mainstream media attention that for the beleaguered union movement was, at least in recent times, probably unprecedented. The coverage included headlines that only months earlier would have been the stuff of activist daydreams, such as this *Los Angeles Times* depiction of employee-management relations at the tail end of the commotion: "Fast-food workers walk out in N.Y. amid rising U.S. labor unrest."<sup>13</sup>

Indeed, "rising U.S. labor unrest," as exhibited through strikes by nonunion workers across the country, was an unexpected—if not startling—development in the labor movement and domestic labor law. While unquestionably legal under the National Labor Relations Act (NLRA or Act), prior to 2012 strikes by both represented and unrepresented workers had all but

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7. Josh Eidelson, *Walmart's Black Friday Ultimatum*, SALON (Oct. 10, 2012, 12:13 PM), [http://www.salon.com/2012/10/10/Walmart\\_strikers\\_raise\\_the\\_stakes\\_with\\_black\\_friday\\_ultimatum](http://www.salon.com/2012/10/10/Walmart_strikers_raise_the_stakes_with_black_friday_ultimatum) [<http://perma.cc/WV5N-NLMG>].

8. Josh Eidelson, *Historic Walmart Strikes Hit 100 Cities*, NATION (Nov. 23, 2012, 9:20 PM), <http://www.thenation.com/blog/171430/historic-walmart-strikes-hit-100-cities-final-update-920-pm> [<http://perma.cc/SJH4-PSHY>].

9. See *id.*; John Logan, *The Mounting Guerilla War Against the Reign of Walmart*, 23 NEW LAB. F. 22, 24 (2014); see also Sarah Jaffe, *How Walmart Organizers Turned the Internet into a Shop Floor*, THESE TIMES (Jan. 16, 2014), [http://inthesetimes.com/article/print/16116/how\\_walmart\\_organizers\\_turned\\_the\\_internet\\_into\\_a\\_shop\\_floor](http://inthesetimes.com/article/print/16116/how_walmart_organizers_turned_the_internet_into_a_shop_floor) [<http://perma.cc/DE8Q-WEWF>] ("Of the estimated 1,500 Walmart protests that occurred across the country on Black Friday last year, many were planned online . . .").

10. Steven Greenhouse, *With Day of Protests, Fast-Food Workers Seek More Pay*, N.Y. TIMES (Nov. 29, 2012), <http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html> [<http://perma.cc/7D84-LUE8>].

11. Josh Eidelson, *In Rare Strike, NYC Fast-Food Workers Walk Out*, SALON (Nov. 29, 2012), [http://www.salon.com/2012/11/29/in\\_rare\\_strike\\_nyc\\_fast\\_food\\_workers\\_walk\\_out](http://www.salon.com/2012/11/29/in_rare_strike_nyc_fast_food_workers_walk_out) [<http://perma.cc/X29E-N259>].

12. Corilyn Shropshire & Naomi Nix, *Retail, Fast-Food Workers Rally for Higher Pay in Chicago*, CHI. TRIB. (Apr. 24, 2013), [http://articles.chicagotribune.com/2013-04-24/business/chicago-fast-food-strike-today-20130424\\_1\\_fast-food-workers-retail-workers-wal-mart-workers](http://articles.chicagotribune.com/2013-04-24/business/chicago-fast-food-strike-today-20130424_1_fast-food-workers-retail-workers-wal-mart-workers) [<http://perma.cc/83WA-ERRJ>].

13. Alana Semuels, *Fast-Food Workers Walk Out in N.Y. Amid Rising U.S. Labor Unrest*, L.A. TIMES (Nov. 29, 2012), <http://articles.latimes.com/2012/nov/29/business/la-fi-mo-fast-food-strike-20121129> [<https://perma.cc/ZT7Y-3Q7W>].

vanished from the landscape. That fact alone made the events well worth writing about.<sup>14</sup>

But there was more to the commotion than just the resurgence of strikes, and when viewed from afar the arc of activity was astonishing: unions, it seemed, had not just edited the script, they had torn it up. To begin with, in the rare post-1970s instances when workers walked off the job, they were almost surely already unionized workers negotiating a contract, not nonunion workers agitating for something else.<sup>15</sup> For this reason the sight of people in McDonald's, Walmart, and other corporate uniforms—all historically, if not notoriously, nonunion brands—striking on sidewalks about assorted job topics was not just eye-catching but tactically notable.

This decades-long pattern of reserving strikes for represented workers stemmed, in part, from ingrained perceptions about the desirability of aggressive activism at various points along the collective bargaining timeline. Work stoppages are legally risky, invite management reprisals like job loss, and run the risk of showcasing embarrassing weakness if participation is low. Thus organizers generally believed that for a strike to be useful, appetites for combativeness needed be high, diffuse, and sustainable.<sup>16</sup> While that constellation certainly can arise during the embryonic stages of unionization, it seems more likely to emerge during a contract fight, a mature point in the labor relations process after the union has already been recognized or certified.<sup>17</sup> There, financial futures are quite literally on the table, interpersonal and community bonds have had time to develop, and workers have achieved a level

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14. Strikes of one thousand workers or more numbered in the range of four to five hundred a year in the 1950s and dropped to the astoundingly low figure of five in 2009. JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 89 (2014). Since the 1980s smaller strikes have declined by over two-thirds. *Id.* at 90. For a comprehensive discussion of the many theories underlying strike decline, see generally JOSIAH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT (2005).

15. A prolonged strike at the New England grocery chain Market Basket received wall-to-wall media coverage, in part because the workers were nonunion. *See, e.g.*, Deirdre Fernandes, *Market Basket a Rare Case in Labor World*, BOS. GLOBE (Aug. 12, 2014) (calling the strike "a very, very special case").

16. Narrative accounts of major strikes showcase this phenomenon well. *See, e.g.*, HARDY GREEN, *ON STRIKE AT HORMEL* 3, 59–83 (1990) (describing years of "bullying threats from Hormel" that led up to and motivated a massive 1984 strike at a meat-processing plant). Similarly, "[s]olidarity," the "willingness of individuals . . . to make cause with others, to make some personal sacrifice for the common good even when they may not directly benefit from it," is crucial for strike success and the "*sine qua non* for the labor movement" generally. Julius G. Getman & Thomas C. Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.: The High Cost of Solidarity*, in *LABOR LAW STORIES* 52, 53 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

17. *See* GREEN, *supra* note 16, at 38–58 (describing the years of difficult contract negotiations that inspired the Hormel Foods strike). After workers have selected a union as their representative, the employer is required to negotiate with it for a contract. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 *INDUS. & LAB. REL. REV.* 3, 5 (2008). During this process workers may strike for bargaining leverage, but once a contract is reached, strikes are prohibited until the contract is renegotiated. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 *LA. L. REV.* 47, 59–63 (2009).

of institutional stability not present during the precarious days when the union was being built.<sup>18</sup>

Here, however, the Walmart and fast-food campaigns were by all accounts in their infancy, with contract talks decidedly not on the horizon. The spot for strikes on the timeline, in other words, had been flipped. And, perhaps predictably, employee turnout could have been characterized either as low or—relative to the total number of workers employed at each restaurant or retail shop—absolutely miniscule. In New York and elsewhere, it was not unusual for a reporter to stop by a rally sparked by the activism of a single restaurant or Walmart worker, with the striker’s home franchise or sales location churning out burgers, pizza, or cheap retail pretty much like normal.<sup>19</sup> Making production not “normal” is, of course, usually considered the very point of any strike, but at Walmart, McDonald’s, and beyond, prioritizing militancy over impact was apparently the order of the day.<sup>20</sup>

Such minority work-site actions were themselves a product of a new sort of organizing.<sup>21</sup> Some percentage of strikers had had contact with the campaign exclusively online, where they learned walkout techniques through an off-the-rack “strike kit.” As a result, there was no simple way for campaign strategists to exercise the usual top-down, in-person control that allows them to assess workers’ complaints, interest in the campaign, or likelihood of walking off the job.

But perhaps most surprising were the very goals—or, rather, the lack of a specific goal—connected to the actions themselves. The fall protests were not about union membership, at least not readily. OUR Walmart and the UFCW railed against retaliation while expressly disclaiming any interest in unionizing Walmart workers. And the fast-food strikers, while nominally demanding the right to form a union, showed more interest in and received much more attention for their claim to a \$15-an-hour wage. This was organizing *by unions*, but it wasn’t union organizing.<sup>22</sup>

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18. Good examples of the high degree of relational work that goes into strengthening such bonds in preparation for a strike can be found at GREEN, *supra* note 16, at 62–110 and ROBERT D. PUTNAM & LEWIS M. FELDSTEIN, BETTER TOGETHER 206–26 (2003) (depicting a strike at UPS).

19. See, e.g., Eidelson, *supra* note 8 (“While there’s no final count of how many workers walked off the job, organizers say one noteworthy trend is the number of places where a worker struck despite being the only one in their store to do so, often in stores with little or no prior OUR Walmart activism.”).

20. Joe Burns, *Labor’s Economic Weapons: Learning from Labor History*, 37 LAB. STUD. J. 337, 339 (2013).

21. Josh Eidelson, *Walmart Workers Model ‘Minority Unionism,’* NATION (Dec. 11, 2012), <http://www.thenation.com/article/walmart-workers-model-minority-unionism> [http://perma.cc/2LZ3-LLRV].

22. See Josh Eidelson, *From Fast Food Strikes to Wal-Mart: 2013 and the Year in Labor*, SALON (Dec. 26, 2013, 4:45 AM), [http://www.salon.com/2013/12/26/from\\_fast\\_food\\_strikes\\_to\\_wal\\_mart\\_2013\\_and\\_the\\_year\\_in\\_labor](http://www.salon.com/2013/12/26/from_fast_food_strikes_to_wal_mart_2013_and_the_year_in_labor) [http://perma.cc/AE86-3Q5W] (“Those strikes reflect the theory behind several of 2013’s high-profile U.S. union-backed non-union organizing campaigns . . .”).

And that's where things get interesting. There is broad agreement that the customary function of unions—acting as employees' exclusive agents at work—has hit a wall, so some of the movement's energy needs to be directed at something new.<sup>23</sup> But no one really knows what that “something” should be, particularly because the outmoded representation arrangement provides its own source of funding through dues, while alternatives generally do not. As former National Labor Relations Board (NLRB or the Board) Chairman Wilma Liebman put it, “If the next big idea was readily at hand . . . someone would have thought of it.”<sup>24</sup>

In a sense, the Walmart and fast-food campaigns fit comfortably within this frame. By rewriting organized labor's playbook, they assert a new vision of workplace activism, and, in rejecting conventional or even clear goals, they create space for a transformative aim to be named later. This openness, however, has left the unions involved vulnerable to skepticism.<sup>25</sup> One strain, rooted in genuine confusion, predominates: What, exactly, are they doing?<sup>26</sup>

That question is the basis for this Article. Using the Walmart and fast-food campaigns as touchstones, it details how unions have taken a turn that recognizes the limits of traditional organizing and acknowledges that effective alternatives are not readily apparent. They have embraced innovations like union organizing without the union organizers, collective action for the sake of collective action, and strikes by courageous but tiny contingents, accepting all the while that what everything might add up to is ultimately uncertain and that mistakes, perhaps big mistakes, will be made. But what in colloquial terms feels like spitballing, and in cynical terms looks like throwing activism at the

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23. See Michael Bologna, *Trumka Calls on Labor Movement to Adapt to New Models of Representation*, DAILY LAB. REP. (Mar. 7, 2013), [http://news.bna.com/dlln/DLLNWB/split\\_display.adp?fedfid=29956532&vname=dlmotalissues&wsn=512488000&searchid=26974465&doctypeid=1&type=date&mode=doc&split=0&scm=DLLNWB&pg=0](http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=29956532&vname=dlmotalissues&wsn=512488000&searchid=26974465&doctypeid=1&type=date&mode=doc&split=0&scm=DLLNWB&pg=0) [https://perma.cc/ETX9-VZY9] (warning that labor's “basic system of workplace representation is failing—failing miserably” and that the times call for organizing strategies untethered to the conventional notion of union “membership”).

24. Harold Meyerson, *If Labor Dies, What's Next?*, AM. PROSPECT (Sept. 13, 2012), <http://prospect.org/article/if-labor-dies-whats-next> [http://perma.cc/5N48-8HY9].

25. Some of the skepticism veers unfortunately into cynicism. See, e.g., Arun Gupta, *Fight for 15 Confidential*, THESE TIMES (Nov. 11, 2013), [http://inthesetimes.com/article/print/15826/fight\\_for\\_15\\_confidential](http://inthesetimes.com/article/print/15826/fight_for_15_confidential) [http://perma.cc/MG8G-HMW5] (criticizing the genuineness of the campaigns); Kathleen Geier, *The Fast Food Strikes: What Is the Fight for 15 Campaign Really About, Anyway?*, WASH. MONTHLY: POL. ANIMAL (Oct. 26, 2013, 3:45 PM), [http://www.washington-monthly.com/political-animal-a/2013\\_10/the\\_fast\\_food\\_strikes\\_what\\_is047519.php](http://www.washington-monthly.com/political-animal-a/2013_10/the_fast_food_strikes_what_is047519.php) [http://perma.cc/79A9-CUQW] (criticizing union-“led” activism).

26. See, e.g., Micah Uetrict, *Is Fight for 15 for Real?*, THESE TIMES (Sept. 19, 2013), [http://inthesetimes.com/article/15618/is\\_fight\\_for\\_15\\_for\\_real](http://inthesetimes.com/article/15618/is_fight_for_15_for_real) [https://perma.cc/L7J4-G36N] (“Among organizers, the campaign's purpose is debated.”); Tim Worstall, *Just Why Are the Unions Supporting a Rise in the Minimum Wage?*, FORBES (Jan. 12, 2015, 4:51 AM), <http://www.forbes.com/sites/timworstall/2015/01/12/just-why-are-the-unions-supporting-a-rise-in-the-minimum-wage/#62745e6a2b2f> [https://perma.cc/5YE9-RJRR] (citing bewilderment surrounding “Fight for \$15”).

wall to see what sticks, deserves a more elegant—and theoretical—frame. I label the phenomenon *improvisational unionism*.

In most settings “improvisation” is a casual term used to depict actions that are unplanned or done spontaneously.<sup>27</sup> If a storm shatters a ship’s mast and the crew figures out some innovative way of getting safely to shore, it might be said that the sailors “improvised.”<sup>28</sup> Improvisation might also be used to describe the snap reaction of angry workers who walk out in the face of frigid working conditions or a biased boss.<sup>29</sup> Even in traditional law and social movement settings, the word is generally invoked colloquially, where activists seem to have made a sudden adaptive choice.<sup>30</sup>

When I use the term, though, I am referring to its sense in the academic discipline of organizational studies, where improvisation means the relentless affirmation and expansion of ideas and where it has been categorized and analyzed as a social practice with the power to facilitate organizational change. Among other lessons, that literature teaches that inventive takes on old problems are crucial to productive evolution, but only in cultures where failure is embraced and even championed. It shows that, contrary to what one might

27. According to Webster’s, to improvise is “to bring about, arrange, or make on the spur of the moment or without preparation.” *Improvise*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1993).

28. See, e.g., Christopher Clarey, *Father and Son Share a Passion for Sailing*, N.Y. TIMES (Dec. 24, 2013), <http://www.nytimes.com/2013/12/25/sports/father-and-son-share-a-passion-for-sailing.html> [<http://perma.cc/5688-C33G>] (using “improvise” in this context).

29. Thomas Kohler, for example, has described scenarios like these as “spontaneous outbursts of discontent delivered through improvised bodies.” Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 301 (1995); see also J. HENRY RICHARDSON, AN INTRODUCTION TO THE STUDY OF INDUSTRIAL RELATIONS 250 (1954) (likening such circumstances to an “improvised strike committee” sparking “immediate action” in the factory).

30. When law and social movement scholars refer to improvisation, it is often in the context of reactive and spontaneous decision making. See, e.g., Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1505 (2005) (noting that movements have an “improvisational quality” because “[t]hey must retain the ability to change course and tactics quickly”); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 891 n.36 (1999) (“The repertoire of collective action typically leaves plenty of room for improvisation, innovation and unexpected endings.”) (citing Charles Tilly, *Social Movements and National Politics*, in STATEMAKING AND SOCIAL MOVEMENTS 307 (Charles Bright & Susan Harding eds., 1984)). As explained *infra*, this project considers improvisation technically and from within the field of organizational studies. It is not, therefore, specifically situated in law and social movement scholarship, though it finds common ground with that literature’s attention to movement innovation and could provide an additional, interdisciplinary lens to understand adaptive movement strategies. Indeed, very recently sociologists and others have called for scholars to consider improvisational dynamics in protest and social movements with greater care. See, e.g., David A. Snow & Dana M. Moss, *Protest on the Fly: Toward a Theory of Spontaneity in the Dynamics of Protest and Social Movements*, 79 AM. SOC. REV. 1122, 1124–26, 1140 (2014) (describing spontaneity as “rarely mentioned” and largely “ignored” in sociological research and advocating for “reconsideration” of its role, including its relation to improvisation). See generally DANIEL FISCHLIN ET AL., *THE FIERCE URGENCY OF NOW* xi–xv (2013) (calling for deeper study of improvisation’s role in rights creation through social movements).

expect, change-directed improvisation does not mean naked spontaneity. Improvisation for transformation requires intention, planning, and training.

My initial claim relates to improvisation as a social practice. I contend that unions are using improvisation to galvanize low-wage workers and the public; that they are doing so in a calculated, coordinated fashion; and that the improvisational style is evidenced in three ways: repeated one-day strikes, the mobilization of autonomous third-party activists, and a newly experimental internal culture.

Next I suggest that improvisation is not just a social practice; it also functions as a legal strategy. In making this argument I recount the story of a movement whose key players viewed the birth of modern labor law with a guarded optimism that splintered once courts began to slice and dice conceptions of protected workplace conduct.<sup>31</sup> In exchange for these limits, the judiciary cloaked unions with fiduciary functions that helped transform them into institutional giants responsible for the economic fates of millions of families. Initially, with members plentiful, these were heady times. But later, with members scarce, the very laws that built unions as we know them circled back to bite those unions.

Having transformed the old-school tactics that assembled the membership in the first place into something that could get workers fired and unions enjoined and fined, labor law rendered effective activism not just legally risky, but prohibitively so. Unions found themselves wondering what they could do to genuinely challenge corporate power on a national scale without blowing a hole through a collectively multibillion dollar balance sheet that represented everything the movement had won and everything workers relied on. For decades the conventional response seemed to be, “With this law? Not much.”

But 2012 brought an insight. Unions could embrace anachronism and encourage workers to drop their tools, exit the premises, and fight on the street. That, at least, was legal, so it could be replicated many times over without putting themselves in obvious peril. Crucially, they could start small, without much of a start-up cost. Unions could free themselves from hidebound procedures, stop worrying about results, and welcome experimentalism. And although they would send in organizers to seed the strike idea beforehand, there would be little pretense that many workers—or any, really—would actually show up. In this setting, a coalition of the willing was just fine. Unions would commit to an activism of the possible and help workers construct a galvanizing liminal space, a few hours between worlds where categories no one ever wanted anyway—like “associate” or “team member”—would give way to affirming labels like activist, speaker, or leader. It would be boundary-busting, but just for a while, because when the clock stopped everybody would go back

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31. For a classic and still incisive summary of these judicial developments, see JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44–66 (1983).

to work. The key was a faith that those who struck would bear witness to those who did not so that next time there would be others. They just needed to be invited.

The hope seemed to be that, in time, thousands—maybe millions—of low-wage workers might be found on an average Tuesday dancing—literally, in many cases—around the legal boxes built up over decades to constrain employee agency. To be sure, no existing campaign is there yet or even close to it. But it is 2016 now. There have been multiple rounds of Walmart Black Friday protests, tens of major fast-food strikes, and hundreds of other smaller protests. It is time for legal scholarship to categorize these surprising events and, especially, to try to explain them. Improvisation, this Article contends, does both.

Part I offers a short history of American labor organizing since 1995, the year unions recommitted themselves to increasing membership. Part II describes a dramatic and unconventional turn in those efforts, providing an in-depth look into UFCW’s campaign against Walmart and SEIU’s campaign against the fast-food industry. Part III introduces improvisation as the key to unlocking the social practice behind the activism, while Part IV demonstrates how improvisation can also function as a legal strategy. Improvisation cannot, however, eliminate all law-related risks, and in some cases it actually foregrounds legal tripwires in ways that other organizing strategies do not. Part V considers the most acute danger, an employer’s right to fire workers who strike “intermittently.” It concludes not only that improvisational strikes do not fall into that category but also that for statutory, policy, and practical reasons, the doctrine itself is so flawed that the NLRB should rethink its continued viability entirely. The Article closes by considering a fundamental question: Where does improvisational unionism go from here?

## I.

### MAKING MORE MEMBERS: CONTEMPORARY TRENDS IN ORGANIZING FOR UNION ALLEGIANCES

#### A. *New Leaders, New Approaches: Private Reordering and State-Based Initiatives*

A modern account of union efforts to stem a long-shrinking membership base should reach back at least to 1995 and the election of John Sweeney as President of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).<sup>32</sup> By then unions represented a bit over 10 percent of private sector workers (down from a third in the 1950s),<sup>33</sup> and something

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32. See Peter T. Kilborn, *Militant Is Elected Head of A.F.L.-C.I.O., Signaling Sharp Turn for Labor Movement*, N.Y. TIMES (Oct. 26, 1995), <http://www.nytimes.com/1995/10/26/us/militant-is-elected-head-of-afl-cio-signaling-sharp-turn-for-labor-movement.html> [<http://perma.cc/KH73-G4MH>].

33. ROSENFELD, *supra* note 14, at 1–3.

like an academic cottage industry had sprung up to neatly sort the sources of decline into categories.<sup>34</sup> Touting the existential threat posed by the status quo, Sweeney's "New Voice" slate forced the incumbent into early retirement<sup>35</sup> and swept into office promising, in particular, to zero in on one cause: the movement itself,<sup>36</sup> which had long since given up organizing new workers.<sup>37</sup>

Changing course was easier said than done. There was an obvious problem of will, as a mere 3 percent of the federation's constituent unions even maintained a department capable of planning a single union campaign.<sup>38</sup> But that situation was theoretically remediable through financial incentives and unions' own fears of obsolescence.<sup>39</sup> The law presented a bigger obstacle. Labor law's famously inadequate worker protections<sup>40</sup> and infamously sluggish administrative scheme<sup>41</sup> combined to make the conventional Board-supervised secret ballot election a protracted and risky affair.<sup>42</sup> And the NLRA's preference for bargaining by job site (as opposed to negotiating across an entire industry or geography) made meaningful growth a painstaking and difficult prospect.<sup>43</sup>

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34. See generally RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 224–45 (1984) (analyzing alleged factors of decline); MICHAEL GOLDFELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987) (sorting the most frequent explanations into sociological, cyclical, and political categories); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 *CHI.-KENT L. REV.* 59, 61 (1993) (offering "views as to why the NLRA has fallen so far").

35. KIM MOODY, *US LABOR IN TROUBLE AND TRANSITION: THE FAILURE OF REFORM FROM ABOVE, THE PROMISE OF REVIVAL FROM BELOW* 129–31 (2007).

36. VANESSA TAIT, *POOR WORKERS' UNIONS: REBUILDING LABOR FROM BELOW* 193 (2005) ("If elected, the New Voice leadership pledged to 'organize at a pace and scale that is unprecedented' and to 'lead a movement that speaks for all American workers.'").

37. In 1972, one of Sweeney's predecessors at the AFL-CIO famously quipped that the size of the membership "doesn't make any difference." ROSENFELD, *supra* note 14, at 10. This "attitude toward organizing set the tone for much of the labor movement" over the following decades. *Id.*

38. TAIT, *supra* note 36, at 192.

39. *Id.* at 194–95.

40. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1774–816 (1983).

41. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2695–96 (2008) (describing "endemic delays that plague Board proceedings" and render its remedies "virtually meaningless").

42. For an in-depth treatment of this process and its consequences, see Michael M. Oswald, *Automatic Elections*, 4 *U.C. IRVINE L. REV.* 801, 805–06, 825–33 (2014). See also Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1536 (2002) ("Unions and their allies have been especially critical of the rules and procedures governing union organizing activity and employers' typically tenacious opposition to that activity."); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 *HARV. L. REV.* 1153, 1162 (2011) ("The NLRB's election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition.").

43. See also TAIT, *supra* note 36, at 193 (noting that by 1995, "to stay even with the losses, trade unions would have to organize 300,000 to 400,000 new members each year . . . [T]o regain the strength of its post-World War II years . . . a million new members would be needed each year for the next two decades"). See generally Matthew Dimick, *Productive Unionism*, 4 *U.C. IRVINE L. REV.* 679,

So with the classic membership channel “blocked,” unions staked a claim on “experimentalism,” adopting two fresh approaches that “decentralized” labor law from an all-encompassing federal scheme to a mishmash of contract, state, and other employment law principles.<sup>44</sup>

The first approach, sometimes labeled “private ordering,”<sup>45</sup> decentered the very rules of organizing from the sclerotic NLRA regime to flexible contracts<sup>46</sup> that defined union rights to contact workers, prove their interest, and trigger bargaining, as well as employer rights to express views on unionism.<sup>47</sup> At a bird’s-eye level the agreements allowed unions to exact a measure of control over the decisional climate while also expanding the universe of voters to however many employers could be persuaded to sign a contract, which, relative to the size of an average NLRB election, was a potential membership boon.<sup>48</sup>

The second approach encouraged or created pathways for atypical or previously overlooked workers to join up with unions.<sup>49</sup> The atypical set included in-home workers caring for children, the elderly, or the disabled who had been cut out from the NLRA under its independent contractor and domestic service exemptions.<sup>50</sup> The overlooked category included NLRA employees who had historically been ignored or marginalized, like exotic dancers,<sup>51</sup> car-wash attendants,<sup>52</sup> and immigrants.<sup>53</sup> It also encompassed employees who

680–83, 706–07 (2014) (describing how decentralization in U.S. bargaining structures impacts union expansion).

44. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 393–96 (2007).

45. *Id.* at 380.

46. While the NLRA preempts states from legislating alternative unionization rules, it welcomes creative arrangements negotiated between unions and employers. Sachs, *supra* note 42, at 1169; see also *In re Verizon Info. Sys.*, 335 N.L.R.B. 558, 559 (2001).

47. Sachs, *supra* note 44, at 378–79.

48. In 2013 the median number of employees involved in NLRB elections was twenty-four. *Median Size of Bargaining Units in Elections*, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections> [<https://perma.cc/EG4C-YTAB>] (last visited Mar. 4, 2016). In contrast, SEIU signed all five of Houston’s high-rise cleaning contractors to a 2005 organizing agreement that netted the union 4,700 new members in one fell swoop. Sachs, *supra* note 44, at 379.

49. Sachs, *supra* note 44, at 382.

50. *Id.* at 382–85.

51. Lauren Smiley, *Last Days at the Lusty Lady Strip Club*, NEW YORKER (Aug. 23, 2013), <http://www.newyorker.com/business/currency/last-days-at-the-lusty-lady-strip-club> [<https://perma.cc/LD3G-XNL9>] (“[In] 1997 . . . unsavory work conditions prompted [the Lusty Lady] to become what is believed to be the first strip club in the United States to successfully unionize . . .”). While evaluating exotic dancers’ status involves highly fact-specific inquiries, the Board and courts have generally found them to be employees subject to the NLRA and other federal employment laws. See, e.g., *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 912 (S.D.N.Y. 2013) (“Nearly ‘[w]ithout exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage.’”).

52. *Our Work*, CLEAN CARWASH CAMPAIGN, <http://www.cleancarwashcampaign.org/our-work> [<http://perma.cc/KY95-9M5U>] (last visited Mar. 4, 2016) (describing successful efforts in the early 2000s to establish collective bargaining agreements for car-wash workers).

53. The AFL-CIO’s staunch anti-immigrant stance reversed during John Sweeney’s presidency. See Roger Waldinger & Claudia Der-Martirosian, *Immigrant Workers and American*

seemed ripe for mobilization on labor-friendly political or other causes but whom, for practical purposes, unions were unlikely to be able to legally represent any time soon. In turn, unions established vehicles to bring them into the fold with affiliation pacts and voluntary dues instead of actual contracts with employers.<sup>54</sup>

### B. *The Rise of Alt-Labor—and Optimism*

Running parallel to the rise of private ordering and the forging of novel member pathways has been something commentators have labeled alternative-labor, or “alt-labor”—“labor” because it involves worker organizing, and “alternative” because unions are not behind the wheel and the remedy sought is not the conventional collectively bargained agreement.<sup>55</sup> Even before the term itself was coined,<sup>56</sup> such efforts existed in community-based “worker centers” focused on low-wage immigrant advocacy through legal assistance, political change campaigns, and protest.<sup>57</sup>

No matter the backdrop, since the 1990s alt-labor has exploded in size and scope. A 1992 attempt to catalogue worker centers identified five, a figure that

*Labor: Challenge . . . or Disaster?*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 49, 51 (Ruth Milkman ed., 2000). Under Sweeney, “recruiting immigrant workers into union ranks . . . bec[a]me increasingly central to the larger project of rebuilding the United States labor movement.” Ruth Milkman, *Introduction* to ORGANIZING IMMIGRANTS, *supra*, at 1.

54. A prime example is the AFL-CIO’s Working America project, which began in 2003 and tries “to pull millions of nonunion workers into the labor movement” through door-to-door conversations about national political issues. Josh Eidelson, *On the Road with Working America*, NATION (Oct. 10, 2012), <http://www.thenation.com/article/road-working-america> [<https://perma.cc/KX79-5ETU>]. A more workplace-centric effort, the Communication Workers of America’s “WashTech” campaign, failed in its initial attempt to bargain for temporary workers at Microsoft but found moderate success attracting voluntary, dues-paying members by publicizing “information about legislative issues affecting contingent and high-tech workers, Microsoft policy changes, [and] general industry news.” Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 376–77, 381–82 (2006).

55. Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <http://prospect.org/article/alt-labor> [<http://perma.cc/468R-EV6B>] (“Lacking the ability to engage in collective bargaining or enforce union contracts, these alternative labor groups rely on an overlapping set of other tactics to reform their industries,” like rights-education, rallies, casting employers in positive or negative lights, and lobbying).

56. Josh Eidelson’s use of “alt-labor” in January 2013 in the *American Prospect* may be the term’s first published appearance. *See id.*

57. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1889–915 (2007); *see also* Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 419–20 (2006); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 232 (2009) (“[W]orker centers . . . generally avoid bargaining with employers.”). Due to the NLR’s remedial inadequacies, worker centers frequently protect labor or collective rights with creative application of employment law statutes. Sachs, *supra* note 41, at 2723–25. For an in-depth treatment of worker-center campaigns, see JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 86–97, 200–01 (2005).

rose to 214 in 2013.<sup>58</sup> Recent adoption of the more expansive term alt-labor reflects the reality that pursuing workplace fairness through street and legal activism—rather than group bargaining—has gone beyond clinic-like, immigrant-centric settings.<sup>59</sup> Today it extends to a multiplicity of other organizations and situations, from the Brooklyn-based Freelancers Union of independent writers<sup>60</sup> to the Model Alliance, which helps runway models prod fashion houses on issues like weight restrictions and sexual harassment.<sup>61</sup>

Taken together, labor’s experiments with private reordering and inventive membership schemes, alongside alt-labor’s zeal to fight for workers without necessarily representing them, struck specialists as a hopeful and even exciting turn with potential to knit unions and workers back into a movement writ large.<sup>62</sup> Social movement law scholar Scott Cummings observed that the “‘legal pluralist’ approach to organizing” revealed “a more fundamental re-orientation . . . under way within the labor movement.”<sup>63</sup> Harvard Law Professor Benjamin Sachs predicted that “[s]elf-consciously embracing . . . these decentralizing trends promises enormous returns.”<sup>64</sup> And when in 2005 a handful of unions quit the AFL-CIO over the inadequate pace of membership growth,<sup>65</sup> labor law academics convened a symposium wondering if the next wave of mass U.S. organizing had finally arrived.<sup>66</sup>

### C. *The Wall Rises (and Reality Sets in)*

All of the experimentalist trends remain today. Newspapers cover private organizing agreements,<sup>67</sup> worker centers continue to claim meaningful

58. Eidelson, *supra* note 55.

59. See, e.g., GORDON, *supra* note 57, at 86–97, 185–236.

60. Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html> [<https://perma.cc/Z8GC-UJTN>].

61. Leon Neyfakh, *Not Your Grandpa’s Labor Union*, BOS. GLOBE (Apr. 6, 2014), <https://www.bostonglobe.com/ideas/2014/04/05/how-labor-advocacy-changing/QKULXuazXGHMW7EBBe6IKJ/story.html> [<https://perma.cc/H52X-JTCM>].

62. See, e.g., Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 904 (2007) (citing “great innovation and excitement in the labor movement”).

63. Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 4–5 (2009).

64. Sachs, *supra* note 44, at 394.

65. Steven Greenhouse, *4th Union Quits A.F.L.-C.I.O. in a Dispute Over Organizing*, N.Y. TIMES (Sept. 15, 2005), <http://www.nytimes.com/2005/09/15/us/4th-union-quits-aflcio-in-a-dispute-over-organizing.html> [<http://perma.cc/ZN3Q-9Y7V>].

66. Seth D. Harris, *Don’t Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. SCH. L. REV. 303, 305–06 (2006).

67. Melanie Trottman & Khris Maher, *SEIU, California Hospitals in Talks on Cooperative Deal*, WALL ST. J. (May 2, 2014), <http://www.wsj.com/articles/SB10001424052702303948104579538454097105542> [<https://perma.cc/D4XX-DEZX>].

victories,<sup>68</sup> unions try to extend membership rights to workers previously overlooked,<sup>69</sup> and all the while old-fashioned NLRB organizing still occasionally grabs headlines.<sup>70</sup> But the acclaim of it all wore off. Numbers-wise, private-sector union membership had actually dropped since 1995,<sup>71</sup> and the alt-labor phenomenon, while captivating, struggled with scalability and financing and by design did nothing for union rolls.<sup>72</sup>

While bad numbers are, of course, nothing new, in 2012 labor's shrinking slice of the workforce pie seemed to touch different nerves, spurring the conclusion that, absent a severe course correction, this time the end really *was* near. On National Public Radio labor reporter Josh Eidelson spoke of “vultures circling around the U.S. labor movement.”<sup>73</sup> *The Nation*, the left's foremost print institution, hosted an ideas forum entitled, “How Can Labor Be Saved?”<sup>74</sup> and words like “desperation” popped up in bold typeface in the labor press.<sup>75</sup>

To be sure, union leadership sounded, if not desperate, completely exasperated. Andy Stern, the innovative former SEIU President, mentioned at a “New Ideas for Labor” panel that he was no longer sure how to save it,<sup>76</sup> an

68. See, e.g., Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html> [<http://perma.cc/23SR-L77P>] (describing the Coalition of Immokalee Workers' successful efforts to better working conditions in Florida tomato fields).

69. See, e.g., Kate Linthicum, *Workers at L.A. Pot Dispensaries Form Labor Union*, L.A. TIMES (Mar. 23, 2012), <http://articles.latimes.com/2012/mar/23/local/la-me-pot-workers-20120323> [<https://perma.cc/TV5J-VRT5>]; Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y. TIMES (Apr. 25, 2014), <http://www.nytimes.com/2014/04/26/sports/northwestern-football-players-cast-votes-on-union.html> [<https://perma.cc/G3JE-KRHG>].

70. See, e.g., Tamar Lewin, *More College Adjuncts See Strength in Union Numbers*, N.Y. TIMES (Dec. 3, 2013), <http://www.nytimes.com/2013/12/04/us/more-college-adjuncts-see-strength-in-union-numbers.html> [<http://perma.cc/5KKP-KQUD>].

71. From 1995 to 2012, the number of U.S. union members dropped from 9.4 to around 7 million. Compare GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 29 (2004), with JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RESEARCH, STATE UNION MEMBERSHIP, 2012 4 (2013).

72. Eidelson, *supra* note 55 (noting a labor historian's conclusion that “[t]here is no way you can have a non-bargaining institution in the long run” since “they are dependent usually on outside funding and support”); Josh Eidelson, *Who Should Fund Alt-Labor?*, NATION (July 17, 2013), <http://www.thenation.com/article/who-should-fund-alt-labor> [<https://perma.cc/QKD6-LUEZ>] (citing “[w]ho should pay the bills” as a primary challenge facing alt-labor groups, because while some “collect voluntary dues from their members . . . hardly any are primarily funded by them”); Neyfakh, *supra* note 61 (questioning alt-labor's “large-scale ability to improve working conditions”).

73. *The Future of the Workers' Movement*, NPR (May 20, 2013), <http://www.npr.org/2013/05/20/185559550/the-future-of-the-workers-movement> [<http://perma.cc/QW2F-BASL>].

74. Josh Eidelson, *How Can Labor Be Saved?*, NATION (Feb. 14, 2013), <http://www.thenation.com/article/172920/how-can-labor-be-saved> [<https://perma.cc/3JBX-QFJ4>].

75. See, e.g., Jenny Brown, *In Walmart and Fast Food, Unions Scaling up a Strike-First Strategy*, LAB. NOTES (Jan. 23, 2013), <http://www.labornotes.org/2013/01/walmart-and-fast-food-unions-scaling-strike-first-strategy> [<http://perma.cc/9LC4-TDBL>].

76. Adele Stan (@addiestan), TWITTER (Dec. 2, 2013, 4:12 PM), <https://twitter.com/addiestan/status/407663472814465025> [<https://perma.cc/2Z7S-YW6Y>] (reporting from the “Changing Face of

AFL-CIO report called membership decline “clear and devastating,”<sup>77</sup> and the federation’s head, Richard Trumka, rated unions as “failing—failing miserably . . . by every critical measure.”<sup>78</sup> Out of the alarm emerged a rough consensus that experimentalism and a half-embrace of alt-labor were not enough,<sup>79</sup> that an obvious fix was not at hand,<sup>80</sup> and that it was time to try something completely different.<sup>81</sup> The philosophy going forward would be a point Trumka repeatedly emphasized to the press: labor’s fealty to the law on the crucial issue of who counts as a unionist was a mistake. Unions, he stressed, needed to “stop letting the law define who our members should be.”<sup>82</sup>

And from there, the stage was set for a very new, and very different, approach to labor organizing.

## II.

### THE CAMPAIGNS AGAINST WALMART AND THE FAST-FOOD INDUSTRY

#### A. *A Note on the Economic Context*

Walmart, McDonald’s, and Yum! Brands (the corporate parent to Kentucky Fried Chicken (KFC), Pizza Hut, and Taco Bell) are some of the biggest private-sector employers in the country<sup>83</sup> and in many respects the vanguard of an economy that has become “downwardly mobile.”<sup>84</sup> No industrialized country beats America’s proportion of low-wage jobs,<sup>85</sup> and despite harder-working, better-educated employees, positions with good pay and benefits have, for decades, been steadily disappearing.<sup>86</sup>

Unionism: New Ideas for Labor in the 21st Century” panel discussion organized by the Sidney Hillman Foundation).

77. AM. FED’N OF LABOR & CONG. OF INDUS. ORGS., FINAL REPORT ON AFL-CIO PRE-CONVENTION OUTREACH AND ENGAGEMENT 4 (2013), <http://www.aflcio.org/content/download/88871/2368791/LSreportjuly.pdf> [https://perma.cc/YB5A-DFZQ].

78. Bologna, *supra* note 23.

79. *See, e.g.*, Meyerson, *supra* note 24 (“‘What would it take for labor to come back?’ one senior union staffer asked earlier this year. ‘[The Great Recession] was the crisis we were waiting for, and it didn’t do it.’”); *see also* Stephen Lerner, *An Injury to All: Going Beyond Collective Bargaining as We Have Known It*, 19 NEW LAB. F. 45, 46 (2010) (“[T]he current model isn’t repairable—we have to figure out and develop a visionary and transformative way to replace it.”).

80. Meyerson, *supra* note 24.

81. Likely capturing the sentiments of a sizable portion of the movement, an SEIU leader proclaimed: “[W]e’ll be remembered—or won’t be—for whether we had the vision to reallocate our resources and our talent on a massive scale to create a new model for worker advocacy.” David Rolf, *Alternative Futures for Labor*, AM. PROSPECT (Dec. 12, 2012), <http://prospect.org/article/alternative-futures-labor> [https://perma.cc/37EJ-WFN5].

82. Bologna, *supra* note 23.

83. Harold Meyerson, *The Forty-Year Slump*, AM. PROSPECT (Nov. 12, 2013), <http://prospect.org/article/40-year-slump> [http://perma.cc/4LWK-3C3E].

84. Meyerson, *supra* note 24.

85. *Id.*

86. JOHN SCHMITT & JANELLE JONES, CTR. FOR ECON. & POL’Y RESEARCH., BAD JOBS ON THE RISE 1–2 (2012), <http://www.cepr.net/documents/publications/bad-jobs-2012-09.pdf> [https://perma.cc/8FU3-54RM]. *Cf.* David Leonhardt & Kevin Quealy, *The American Middle Class Is*

In this regard, the three megacorporations fit right in, offering almost nothing but hourly wages hovering around \$8 to \$9.<sup>87</sup> Moreover, the industries they lead, retail and fast-food, are among the nation's largest<sup>88</sup> and quickly getting bigger.<sup>89</sup> They are also increasingly the landing spot for older,<sup>90</sup> educated job seekers<sup>91</sup> mired in low-wage work for the long haul.<sup>92</sup> And though it perhaps goes without saying, on-call scheduling, missed breaks, generalized disrespect, and the physical and emotional tolls that mark retail and fast-food work make for days on the job that, even beyond bad pay, are rather grim.<sup>93</sup>

Into this setting, U.S. unions launched their campaigns against Walmart and the fast-food industry.

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*No Longer the World's Richest*, N.Y. TIMES (Apr. 22, 2014), <http://www.nytimes.com/2014/04/23/upshot/the-american-middle-class-is-no-longer-the-worlds-richest.html> [<http://perma.cc/7FXA-GW2F>] (“The American middle class, long the most affluent in the world, has lost that distinction.”).

87. Catherine Ruetschlin, *Fast Food Failure: How CEO-to-Worker Pay Disparity Undermines the Industry and the Overall Economy*, DEMOS 18 (2014) (“Fast food workers earn the lowest average wage of all occupations, with the average worker in the industry earning \$9.09 per hour.”). Though Walmart touts an average wage of \$12.50, internal documents have pegged base pay at \$8 an hour, increasing only slightly over time. Ned Resnikoff, *Leaked Document Shows What Walmart Really Pays Its Workers*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/the-ed-show/leaked-document-shows-what-walmart-really-pay> [<http://perma.cc/BTX5-B3LB>] (linking to document at [http://big.assets.huffingtonpost.com/Walmart\\_0.pdf](http://big.assets.huffingtonpost.com/Walmart_0.pdf) [<https://perma.cc/GAS6-WJ3P>]).

88. *Occupational Employment and Wages Summary*, BUREAU LAB. STATS., <http://stats.bls.gov/news.release/ocwage.nr0.htm> [<http://perma.cc/VR2A-WMJF>] (last modified Mar. 25, 2015).

89. The Department of Labor projects retail and fast-food jobs to grow around 10 to 14 percent in the next eight years. *Occupations with the Most Job Growth*, BUREAU LAB. STATS., [http://www.bls.gov/emp/ep\\_table\\_104.htm](http://www.bls.gov/emp/ep_table_104.htm) [<http://perma.cc/75EU-XRKK>] (last modified Dec. 19, 2013). Fast food, in particular, is the fastest growing industry in the country, making up 5 percent of all newly created jobs since 2010. Richard Florida, *The Uneven Geography of America's Fast Food Jobs*, ATLANTIC CITYLAB (Aug. 1, 2013), <http://www.citylab.com/work/2013/08/uneven-geography-americas-fast-food-jobs/6365> [<http://perma.cc/QR3T-9YZ9>].

90. Alan Feuer, *Life on \$7.25 an Hour*, N.Y. TIMES (Nov. 28, 2013), <http://www.nytimes.com/2013/12/01/nyregion/older-workers-are-increasingly-entering-fast-food-industry.html> [<http://perma.cc/D8WA-RUK8>] (“The classic image of the high-school student flipping Big Macs after class is sorely out of date. . . . These days . . . the average age of fast-food workers is 29.”).

91. Lawrence Mishel, *Low-Wage Workers Have Far More Education than They Did in 1968, Yet They Make Far Less*, ECON. POL'Y INST. (Jan. 23, 2014), <http://www.epi.org/publication/wage-workers-education-1968> [<http://perma.cc/G2KE-UQAE>].

92. See, e.g., Jena McGregor, *Fast Food Workers Are Staying Longer on the Job—and Wanting More*, WASH. POST (Aug. 29, 2013), <https://www.washingtonpost.com/news/on-leadership/wp/2013/08/29/fast-food-workers-are-staying-longer-on-the-job-and-wanting-more> [<https://perma.cc/X84L-GKK6>].

93. See, e.g., JENNIFER PARKER TALWAR, FAST FOOD, FAST TRACK 65, 69–73, 97–99 (2002) (discussing the social stigma, unpredictable and sometimes punitive scheduling, and emotional labor that accompany fast-food work); Joseph Williams, *My Life as a Retail Worker: Nasty, Brutish, and Poor*, ATLANTIC (Mar. 11, 2014), <http://www.theatlantic.com/business/archive/2014/03/my-life-as-a-retail-worker-nasty-brutish-and-poor/284332> [<http://perma.cc/M4VY-MYX7>].

### B. Walmart

Walmart has been described as the “template business” behind many of the above trends.<sup>94</sup> This is in part because its massive size and dogged cost-cutting drive out competition, but also because its global presence and grip over suppliers allow it to dictate ever-shrinking labor costs—that is, pay—across wide swaths of the economy.<sup>95</sup>

Walmart’s aggressive moves into groceries and then unionized supermarket strongholds have therefore long been a terrifying prospect for UFCW and something it has vigorously fought over the years.<sup>96</sup> Though these previous efforts have tended to be either losing bids to constrain the megaretailer’s growth or fizzled experiments to attract its employees, the battles clarified a basic truth: given Walmart’s incredible reach, a credible campaign against it requires multiple, sometimes overlapping, fronts.<sup>97</sup> The UFCW’s most recent effort is also its most comprehensive, and it has four main components: (1) an evolving band of activist workers known as OUR Walmart, (2) cutting-edge social media spreading OUR Walmart’s message, (3) partnerships with like-minded groups embedded in the Walmart supply chain, and (4) global relationships pushing its agenda abroad.

#### 1. *In the Stores and on the Strike Line: OUR Walmart*

The heart of UFCW’s campaign is OUR Walmart, a loose association of Walmart employees that the union began recruiting quietly door-to-door in 2010.<sup>98</sup> The organization went public in June 2011, hand-delivering a nine-

94. Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First-Century Capitalism*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 3, 3–5 (Nelson Lichtenstein ed., 2006).

95. See Misha Petrovic & Gary G. Hamilton, *Making Global Markets: Wal-Mart and Its Suppliers*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM*, *supra* note 94, at 107, 130–35; Meyerson, *supra* note 83.

96. Nancy Cleeland & Abigail Goldman, *Grocery Unions Battle to Stop Invasion of the Giant Stores*, *L.A. TIMES* (Nov. 25, 2003), <http://articles.latimes.com/2003/nov/25/business/fi-walmart25> [<http://perma.cc/TN7Y-KRGZ>].

97. See, e.g., *id.*; Amy Joyce, *Group to Form Association for Wal-Mart Employees*, *WASH. POST* (Nov. 4, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302316\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302316_pf.html) [<http://perma.cc/QSH8-M6QA>]; Charlie LeDuff & Steven Greenhouse, *Grocery Workers Relieved, if Not Happy, at Strike’s End*, *N.Y. TIMES* (Feb. 28, 2004), <http://www.nytimes.com/2004/02/28/us/grocery-workers-relieved-if-not-happy-at-strike-s-end.html> [<http://perma.cc/46XH-ZDKY>] (depicting management as “largely victorious” in forcing UFCW to accept post-strike contract concessions to reflect Walmart’s incursion into the California market); Janet Novack, *Walmart Wins Again as Washington D.C. Mayor Vetoes \$12.50 Minimum Wage*, *FORBES* (Sept. 12, 2013), <http://www.forbes.com/sites/janetnovack/2013/09/12/walmart-wins-again-as-washington-d-c-mayor-vetoes-12-50-minimum-wage/print> [<http://perma.cc/D875-5QL6>] (vetoing a union-backed bill intended to scuttle Walmart’s expansion into Washington, D.C., and noting an identical result in Chicago).

98. Jenny Brown, *Walmart Nervous as Black Friday Strike Nears*, *LAB. NOTES* (Nov. 21, 2012), [www.labornotes.org/2012/11/walmart-nervous-black-friday-strike-nears](http://www.labornotes.org/2012/11/walmart-nervous-black-friday-strike-nears) [<http://perma.cc/34D5-SBVM>]; Andy Kroll, *Walmart Workers Get Organized—Just Don’t Say the U-Word*, *MOTHER*

point “Declaration for Respect” demanding that top executives recognize “freedom of association” and “freedom of speech,” “[p]rovide wages and benefits that ensure that no Associate has to rely on government assistance,” and “[l]isten to us, the Associates.”<sup>99</sup>

While such broad calls are important end goals, OUR Walmart’s bread and butter is agitating for specific job improvements through collective action.<sup>100</sup> Recurring complaints about unpredictable scheduling, for example, prompted the organization to plan 150 coordinated showdowns where workers marched on management with petitions requesting a revamped staffing system.<sup>101</sup>

But the activism the organization is best known for is a series of unprecedented work stoppages that began with a twenty-four-hour walkout by about sixty Southern California employees in September 2012 and, seemingly, just kept going. By October the strikes had spread beyond California to seven cities coast to coast,<sup>102</sup> an impressive expansion in its own right but only a prelude to what the group said it was planning for the day after Thanksgiving, colloquially known as “Black Friday” and the biggest retail sales day of the year.<sup>103</sup> That year significant media attention focused on Walmart and other retailers’ decision to open for business not just, as tradition dictated, during the ultra-early, post-turkey shopping rush, but also on the holiday itself.<sup>104</sup>

In the preceding weeks OUR Walmart had latched onto the issue and incorporated it into a narrative of dinners cut short so that the retailer could cater to bargain-obsessed consumers.<sup>105</sup> That account appeared to strike a chord

JONES (Feb. 4, 2013), <http://www.motherjones.com/print/214726> [<http://perma.cc/849P-9QVS>]. Dues are officially \$5 a month, but any level of support, moral or otherwise, allows a Walmart worker to get involved. *Become a Member*, OUR WALMART, <http://forrespect.org/become-a-member> [<http://perma.cc/A8FP-EJK9>] (last visited Mar. 4, 2016).

99. *The Declaration*, OUR WALMART, <http://forrespect.org/the-declaration> [<https://perma.cc/6EXG-UWB9>] (last visited Sept. 15, 2015).

100. See Wal-Mart Stores, Inc., No. 12-CA-105798, 2014 WL 670197, at \*1 (Feb. 7, 2014) (“[OUR Walmart’s] stated goal is to educate the Employer’s employees about workplace rights and help them improve their working conditions at the Employer.”).

101. Josh Eidelson, *Walmart Workers Plan Wednesday Scheduling Showdowns in 150 Stores*, NATION (Apr. 23, 2013), <http://www.thenation.com/article/walmart-workers-plan-wednesday-scheduling-showdowns-150-stores> [<https://perma.cc/7GL9-LJGQ>].

102. See Josh Eidelson, *Walmart Strikes Spread to More States*, SALON (Oct. 9, 2012), [http://www.salon.com/2012/10/09/walmart\\_strikes\\_spread\\_to\\_more\\_states](http://www.salon.com/2012/10/09/walmart_strikes_spread_to_more_states) [<http://perma.cc/57LR-KNN7>].

103. Brown, *supra* note 98 (“Plans for Black Friday walkouts at Walmart stores have spread dramatically . . . . [And] more Walmart stores have been added daily.”).

104. See, e.g., Abha Bhattarai, *Black Thursday? Stores to Open Even Earlier on Thanksgiving*, WASH. POST (Nov. 12, 2012), [https://www.washingtonpost.com/business/capitalbusiness/black-thursday-stores-to-open-even-earlier-on-thanksgiving/2012/11/12/5ee865c8-2ced-11e2-a99d-5c4203af7b7a\\_story.html](https://www.washingtonpost.com/business/capitalbusiness/black-thursday-stores-to-open-even-earlier-on-thanksgiving/2012/11/12/5ee865c8-2ced-11e2-a99d-5c4203af7b7a_story.html) [<http://perma.cc/W9J3-ASP7>].

105. Organization United for Respect, *OUR Walmart’s Statement on Thanksgiving Schedules from Mary Pat Tiff*, FACEBOOK (Nov. 8, 2012), <https://www.facebook.com/OURWMT/posts/520607284618588> [<https://perma.cc/ZG4H-CY2U>] (“This Thanksgiving, while millions of

with the public, jolting a company spokesperson to take to national television to warn that “there could be consequences” if workers struck on Black Friday.<sup>106</sup> Undaunted, that morning four hundred workers walked off the job to join over a thousand rallies across forty-six states and OUR Walmart officially had the nation’s attention.<sup>107</sup>

Riding the wave of momentum, OUR Walmart continued to organize stoppages of varying sizes all over the country,<sup>108</sup> punctuated more and more by civil disobedience and arrests.<sup>109</sup> In the meantime, Walmart, by now well-schooled in handling protests after decades of defending its policies from advocates of all stripes,<sup>110</sup> fought back without hesitation. From there, ending retaliation against OUR Walmart became glued to strikers’ ever-fluid list of demands.<sup>111</sup> The second round of Black Friday walkouts in 2013 highlighted the issue in demonstrations that included 116 activists led off to jail, veritable catnip for the press.<sup>112</sup> In 2014 they did it again.<sup>113</sup>

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families plan to spend quality time with their loved ones, many Walmart workers have been told we will be stocking shelves and preparing for doors to open at 8pm on Thanksgiving night.”)

106. Ben Tracy, *Walmart Workers Plan Black Friday Protests*, CBS NEWS (Nov. 19, 2012, 7:46 PM), <http://www.cbsnews.com/news/walmart-workers-plan-black-friday-protests> [<http://perma.cc/VH6P-U59Z>].

107. Eidelson, *supra* note 22; Dominic Rushe, *Walmart Hit by Black Friday Strikes Across 46 States, Say Protestors*, GUARDIAN (Nov. 23, 2012), <http://www.theguardian.com/business/2012/nov/23/walmart-black-friday-strikes-protesters> [<http://perma.cc/A57S-XSLK>].

108. *See, e.g.*, Josh Eidelson, *Walmart Workers Launch First-Ever ‘Prolonged Strikes’ Today*, NATION (May 28, 2013), <http://www.thenation.com/article/walmart-workers-launch-first-ever-prolonged-strikes-today> [<http://perma.cc/9X3C-CPYE>]; Eidelson, *supra* note 5; Josh Eidelson, *Breaking: California Wal-Mart Workers Strike Today, Following Stunning Florida Victory*, SALON (Nov. 6, 2013, 7:30 AM), [http://www.salon.com/2013/11/06/breaking\\_california\\_wal\\_mart\\_workers\\_strike\\_today\\_following\\_stunning\\_florida\\_victory](http://www.salon.com/2013/11/06/breaking_california_wal_mart_workers_strike_today_following_stunning_florida_victory) [<http://perma.cc/CP5G-WFMT>]; Josh Eidelson, *Breaking: Wal-Mart Workers Strike, Target Workers Threaten to Join Black Friday Walkout*, SALON (Nov. 12, 2013, 6:00 AM), [http://www.salon.com/2013/11/12/breaking\\_wal\\_mart\\_workers\\_strike\\_as\\_target\\_workers\\_threaten\\_to\\_join\\_black\\_friday\\_walkout](http://www.salon.com/2013/11/12/breaking_wal_mart_workers_strike_as_target_workers_threaten_to_join_black_friday_walkout) [<http://perma.cc/G8B7-2VGS>].

109. *See, e.g.*, Josh Eidelson, *Fired Walmart Workers Arrested at Rally Announcing Labor Day Deadline*, NATION (Aug. 22, 2013), <http://www.thenation.com/article/fired-walmart-workers-arrested-rally-announcing-labor-day-deadline> [<http://perma.cc/Y7JH-VVQ8>]; Robert J. Lopez, *54 Demonstrators Arrested at Wal-Mart Protest in Chinatown*, L.A. TIMES (Nov. 7, 2013, 9:38 PM), <http://www.latimes.com/local/lanow/la-me-ln-54-arrested-walmart-protest-chinatown-20131107-story.html> [<http://perma.cc/K72X-T88S>].

110. *See* Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1503 (2008).

111. *See, e.g.*, ERIN JOHANSSON, *FIGHTING FOR A VOICE: WALMART WORKERS SPEAK OUT DESPITE SYSTEMATIC LABOR ABUSE* 27 (2013) (cataloguing retaliatory incidents and OUR Walmart’s efforts to fight back); Ned Resnikoff, *Leaked Documents Show How Walmart Combats Labor Protests*, MSNBC (Jan. 16, 2014, 5:21 PM), <http://www.msnbc.com/all/inside-walmarts-anti-strike-campaign> [<http://perma.cc/5KBW-D5Q5>].

112. Josh Eidelson, *Tens of Thousands Protest, Over 100 Arrested in Black Friday Challenge to Wal-Mart*, SALON (Nov. 29, 2013, 4:40 PM), [http://www.salon.com/2013/11/30/tens\\_of\\_thousands\\_protest\\_over\\_100\\_arrested\\_in\\_black\\_friday\\_challenge\\_to\\_wal\\_mart](http://www.salon.com/2013/11/30/tens_of_thousands_protest_over_100_arrested_in_black_friday_challenge_to_wal_mart) [<https://perma.cc/TF55-ZTJB>]; Eidelson, *supra* note 22.

In between strikes, OUR Walmart members and supporters pressed their case by staging aggressive demonstrations on Walmart property that frequently made creative use of the element of surprise.<sup>114</sup> Choreographed dance routines known as “flash mobs”<sup>115</sup> filled otherwise quiet aisles, workers suddenly erupted in chants throughout stores,<sup>116</sup> one manager received rotten pumpkins as a Halloween “gift,”<sup>117</sup> and store exteriors morphed into impromptu movie screens for protest videos projected from trucks plastered with OUR Walmart paraphernalia and, for good measure, blasting Twisted Sister’s “We’re Not Gonna Take It.”<sup>118</sup>

The group has also paid special attention to Walmart’s board of directors. In 2012 workers presented board member Jim Walton with a sweepstakes-sized check equal to an hourly worker’s wage (a less than sweepstakes-sized \$8.81), and staged a sit-in at Yahoo! after Chief Executive Officer and Walmart Director Marissa Mayer declined to meet.<sup>119</sup> Armed with small stashes of Walmart stock, activists have also made spirited presentations before the full board at Walmart’s famously lavish, Hollywood-studded shareholders’ meeting.<sup>120</sup>

As OUR Walmart’s activism matured, its central issues narrowed somewhat, often returning to demands for a \$25,000 minimum salary or, later,

113. Steven Greenhouse, *On Black Friday, Walmart Is Pressed for Wage Increases*, N.Y. TIMES (Nov. 28, 2014), <http://www.nytimes.com/2014/11/29/business/on-black-friday-protesters-demand-wage-increases-and-schedule-changes-from-walmart.html> [<http://perma.cc/VV6H-DEV4>].

114. Wal-Mart Stores, Inc., No. 12-CA-105798, 2014 WL 670197, at \*1 (Feb. 7, 2014) (“[OUR Walmart] has held numerous rallies and demonstrations at the Employer’s corporate headquarters and retail stores nationwide.”).

115. Sara Yasin, *Watch These Union Workers Give Walmart Bosses a Powerful Lesson They’ll Never Forget*, MIC (Sept. 18, 2013), <http://www.policymic.com/articles/64217/watch-these-union-workers-give-walmart-bosses-a-powerful-lesson-they-ll-never-forget> [<http://perma.cc/BHM9-X32U>].

116. Rhonda Smith, *NLRB Issues Complaint Against UFCW over Black Friday Protest in Michigan Store*, DAILY LAB. REP. (Apr. 3, 2014).

117. Complaint at 7, *Wal-Mart Stores, Inc. v. United Food & Commercial Workers* (9th Cir. Mar. 22, 2013).

118. N.L.R.B., Advice Memorandum, *Wal-Mart Stores, Inc.*, No. 13-CA-99526 (Aug. 14, 2013).

119. Josh Eidelson, *Fired Walmart Workers Arrested in Protest at Yahoo Headquarters*, NATION (June 24, 2013), <http://www.thenation.com/article/fired-walmart-workers-arrested-protest-yahoo-headquarters> [<http://perma.cc/L27Y-YSWJ>]; see also Connor Wince, *Walmart Protest Targets Chairman’s Paradise Valley Home*, REPUBLIC (June 3, 2014, 4:03 PM), <http://www.azcentral.com/story/news/local/scottsdale/2014/06/03/walmart-paradise-valley-protest-rob-walton-abrk/9917009> [<http://perma.cc/R9XA-7WRD>].

120. Josh Eidelson, *Whose Walmart?: Workers Crash Walmart’s Party*, NATION (June 17, 2013), <http://www.thenation.com/article/whose-walmart-workers-crash-walmarts-party> [<http://perma.cc/9ZWB-YYRJ>]; see also Ashley Lutz, *How Wal-Mart Gets Top Celebrities to Perform for Free at Its Shareholder Meeting*, BUS. INSIDER (June 10, 2013, 10:58 AM), <http://www.businessinsider.com/walmart-meeting-celebrity-performances-2013-6> [<https://perma.cc/BH4E-CUVF>] (describing Hugh Jackman as the meeting’s “master of ceremonies” and noting live performances by Kelly Clarkson and John Legend).

\$15 an hour in base pay.<sup>121</sup> Another recurrent theme is Walmart's treatment of women, who make up over two-thirds of the company's hourly workers.<sup>122</sup> In 2014 the group launched the unforgettably titled "Respect the Bump" minicampaign that, with help of a broad coalition, forced Walmart to give in on a number of long-sought policy changes impacting pregnant workers.<sup>123</sup> That same year, OUR Walmart returned to the company's stock meeting, this time flanked by the "Walmart Moms," a collection of strikers from twenty cities calling for the \$25,000 floor and an end to spotty hours that wreak havoc on childcare commitments.<sup>124</sup>

Through it all UFCW's endgame has remained unclear, though one obvious aim has always been off-limits: UFCW does not want to unionize Walmart workers.<sup>125</sup> Its main ambition instead seems simply to continue boosting OUR Walmart participation, pressuring the company to the greatest

121. See, e.g., Susan Berfield, *Walmart Moms Make the Case for \$25,000 a Year*, BLOOMBERG BUS. (June 2, 2014), <http://www.bloomberg.com/bw/articles/2014-06-02/walmart-moms-head-to-walmarts-headquarters-to-make-a-case-for-25-000-a-year> [https://perma.cc/CWC6-VCM2]; Olivera Perkins, *Walmart Workers Strike Today, as Report Says Women Hardest Hit by Retail's Low Wages*, CLEV. PLAIN DEALER (June 4, 2014, 3:01 PM), [http://www.cleveland.com/business/index.ssf/2014/06/walmart\\_workers\\_strike\\_today\\_a.html](http://www.cleveland.com/business/index.ssf/2014/06/walmart_workers_strike_today_a.html) [https://perma.cc/VR38-USL2]; Ned Resnikoff, *Fast Food Workers Plan Nationwide Strike for December 4*, AL JAZEERA AM. (Nov. 29, 2014, 12:01 AM), <http://america.aljazeera.com/articles/2014/11/29/fast-food-workersplannationwidestrikefordecember4.html> [http://perma.cc/FAP2-PAHB] ("Recently . . . OUR Walmart adopted the . . . demand of a \$15 base wage.").

122. Brad Seligman, *Patriarchy at the Checkout Counter: The Dukes v. Wal-Mart Stores, Inc., Class-Action Suit, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM*, *supra* note 94, at 231, 237.

123. Lydia DePillis, *Under Pressure, Wal-Mart Upgrades Its Policy for Helping Pregnant Workers*, WASH. POST (Apr. 5, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers> [http://perma.cc/YZ9R-BDND]; Josh Eidelson, *Wal-Mart Tore My Family Apart: Inside a Worker's Heartbreaking Pregnancy 'Disaster,'* SALON (Apr. 9, 2014, 5:30 AM), [http://www.salon.com/2014/04/09/wal\\_mart\\_tore\\_my\\_family\\_apart\\_inside\\_a\\_workers\\_heartbreaking\\_pregnancy\\_disaster](http://www.salon.com/2014/04/09/wal_mart_tore_my_family_apart_inside_a_workers_heartbreaking_pregnancy_disaster) [http://perma.cc/F796-4WQV]; see also *Respect the Bump*, OUR WALMART, <http://forrespect.org/respect-the-bump> [http://perma.cc/VG8B-TUHJ] (last visited Mar. 4, 2016).

124. Sarah Jaffe, *Walmart Moms' Walkout Starts Friday*, THESE TIMES (May 29, 2014, 5:59 PM), [http://inthesetimes.com/working/entry/16759/hundreds\\_of\\_walmart\\_moms\\_strike\\_friday](http://inthesetimes.com/working/entry/16759/hundreds_of_walmart_moms_strike_friday) [http://perma.cc/F6ZF-AU2P]; Sarah Jaffe, *Walmart's Women Can't Save Money or Live Better with Wages or Hours Like This*, GUARDIAN (June 4, 2014), <http://www.theguardian.com/commentisfree/2014/jun/04/walmart-women-save-money-live-better-wages-hours> [http://perma.cc/R7A7-69EJ]. Overall the group has had some success on both fronts, with Walmart announcing pay hikes and hours concessions in early 2015. See Paul Ziobro & Eric Morath, *Wal-Mart Raising Wages as Market Gets Tighter*, WALL ST. J. (Feb. 19, 2015, 7:56 PM), <http://www.wsj.com/articles/wal-mart-plans-to-boost-pay-of-u-s-workers-1424353742> [http://perma.cc/49XA-DVGQ].

125. See also Max Fraser, *Can the One-Day Strike Revive the Labor Movement?*, DISSENT MAG. (Winter 2014), <http://www.dissentmagazine.org/article/can-the-one-day-strike-revive-the-labor-movement> [http://perma.cc/8GH5-7DDW] ("OUR Walmart publicly disavows any intent to operate like a traditional union for Walmart workers."); Harold Meyerson, *How Unions Are Getting Their Groove Back*, AM. PROSPECT (Apr. 25, 2013), <http://prospect.org/article/how-unions-are-getting-their-groove-back> [http://perma.cc/6X52-R5LF] ("With the backing of the United Food and Commercial Workers, thousands of Wal-Mart employees have formed an association—not a union seeking a contract . . .").

possible degree on the greatest number of issues at the greatest variety of locations. As one scholar put it, OUR Walmart just wants to keep doing “more.”<sup>126</sup>

A key component of that ambition is the sophisticated use of social media.

## 2. *Virtually: The Internet and Social Media*

Social media’s impact on activism has been a popular discussion point in recent years,<sup>127</sup> and in many ways UFCW’s use of new technology points to its constructive potential. OUR Walmart of course has a website. And, like many entities, it promotes itself through networked advertising so that people encounter clickable OUR Walmart links if they report on Facebook that they work at the company.<sup>128</sup>

OUR Walmart is most interested, however, in engaging employees concerned about working conditions but afraid to speak out publicly, a universe it labels “the silent majority.”<sup>129</sup> To attract these workers, OUR Walmart created “AssociateVoices.org,” a site that encourages anonymous sharing of work-related anecdotes and grievances and, in a nod to those without easy Internet access, allows posts through text messaging.<sup>130</sup> OUR Walmart both monitors and guides discussions on the site while allowing workers to start their own fights by asking the group to visit their store and demonstrate, even if the initiating employee is not personally prepared to participate.<sup>131</sup>

The group’s most important innovation, however, arose from the reality that UFCW is not big enough to assign staff to each of Walmart’s nearly five thousand locations.<sup>132</sup> In place of paid organizers, OUR Walmart wrote a do-it-yourself guide to workplace protest—otherwise known as the “strike kit”—and made it available for free, online.<sup>133</sup> “Making Change at Walmart,” OUR Walmart’s sister organization for nonemployees, then supplemented the kit with a “protest in a box” feature that allows sympathetic community groups to fill in wherever UFCW cannot be present.<sup>134</sup>

Finally, OUR Walmart has mastered the Twitter art of “trending,” harnessing a technology called “Thunderclap” to popularize tweets about the

126. Logan, *supra* note 9, at 28.

127. See, e.g., CHARLES TILLY, *SOCIAL MOVEMENTS, 1768–2004* 106 (2004); Malcolm Gladwell, *Small Change*, *NEW YORKER* (Oct. 4, 2010), <http://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell> [<http://perma.cc/FSA6-VPXX>].

128. Jaffe, *supra* note 9.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*; *Our Locations*, WALMART, <http://corporate.walmart.com/our-story/our-business/locations> [<https://perma.cc/P7SV-FTJH>] (last visited Mar. 4, 2016).

133. Jaffe, *supra* note 9.

134. *Id.*

Black Friday protests and promote a website dedicated to strikes on that day.<sup>135</sup> Its prowess in this area allows it to quickly saturate cyberspace whenever relevant news or reports are released,<sup>136</sup> which, given the number of organizational partners involved in the campaign, is relatively often. To be sure, external affiliations enable OUR Walmart to spread its impact outside the virtual sphere, touching Walmart-owned warehouses and the company's contracted labor chain.

### 3. *Working with Friends: Walmart Warehouses*

Much of Walmart's business success is linked to an obsessive focus on logistics,<sup>137</sup> particularly the smooth passage of goods from one of three warehouse complexes near Los Angeles, Chicago, and in New Jersey to its shelves.<sup>138</sup> Staffed by temporary labor firms under Walmart's direction, working conditions at the distribution centers are plagued with safety and wage violations,<sup>139</sup> presenting UFCW with an enticing opportunity to pressure Walmart beyond the usual retail setting.<sup>140</sup> Through partnerships with Warehouse Workers United on the West Coast, Warehouse Workers for Justice (WWJ) in Illinois, and New Labor, a worker center on the East Coast, OUR Walmart has been able to support an array of activism closer to consumers.<sup>141</sup>

Most prominently, in September 2012 the California warehouse workers staged a multiweek strike against retaliation, repeated it two months later, and walked out again in July 2013.<sup>142</sup> Workers in Elwood, Illinois also struck in late 2012, completely shutting down Walmart's main Midwest distribution hub

135. *Id.* Walmart's attempt at a counter-Thunderclap had one-tenth the impact. *Id.*; see also *FAQs About Trends on Twitter*, TWITTER, <https://support.twitter.com/articles/101125-faqs-about-trends-on-twitter#> [<https://perma.cc/39LY-GL5X>].

136. See, e.g., @ForRespect, TWITTER (June 6, 2014) (live-tweeting Walmart's 2014 shareholders meeting).

137. Edna Bonacich & Khaleelah Hardie, *Wal-Mart and the Logistics Revolution*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM*, *supra* note 94, at 163, 170–74.

138. Jane Slaughter, *Supply Chain Workers Test Strength of Links*, LAB. NOTES (Mar. 29, 2012), <http://www.labornotes.org/2012/03/supply-chain-workers-test-strength-links> [<http://perma.cc/LB2N-WEZZ>].

139. EUNICE HYUNHYE CHO ET AL., NAT'L EMP'T LAW PROJECT, *CHAIN OF GREED: HOW WALMART'S DOMESTIC OUTSOURCING PRODUCES EVERYDAY LOW WAGES AND POOR WORKING CONDITIONS FOR WAREHOUSE WORKERS 2–3* (2012).

140. See Slaughter, *supra* note 138 (stating that “[t]he strategy is to organize workers on the lowest rungs of the Walmart ladder at the same time that allies such as . . . OUR Walmart . . . are pressuring the company”).

141. *Id.* (describing the campaigns as “[i]inked”); see also Jane Slaughter, *Warehouse Strategies Squeeze Walmart's Pressure Points*, LAB. NOTES (Jan. 23, 2013), <http://www.labornotes.org/2013/01/warehouse-strategies-squeeze-walmart%E2%80%99s-pressure-points> [<https://perma.cc/37FX-525G>] (“The warehouse worker groups maintain close communication with OUR Walmart . . . and activist warehouse workers attended November's Black Friday protests at the stores.”).

142. Logan, *supra* note 9, at 24; Josh Eidelson, *Warehouse Workers Moving Walmart Baggage Will Strike Today*, NATION (July 24, 2013), <http://www.thenation.com/article/warehouse-workers-moving-walmart-baggage-will-strike-today> [<http://perma.cc/2UC8-LPA6>].

after presenting the company with a six-figure signature petition demanding an end to legal violations at the warehouse.<sup>143</sup> And New Labor, the New Jersey worker center, successfully forced Walmart's contracted staffing agency to stop charging warehouse employees for unnecessary travel costs.<sup>144</sup>

#### 4. Working with Friends: Global Allies

Finally, because so much of Walmart's supply chain is rooted abroad,<sup>145</sup> UFCW maintains overseas relationships and an international presence. The power of those connections appeared most vividly two weeks after the first Black Friday strikes when demonstrators in Nicaragua, India, South Africa, Argentina, and six other countries called on Walmart to rehire fired OUR Walmart members and follow international labor standards.<sup>146</sup>

And unsurprisingly, Walmart's brushes with scandal overseas have provided UFCW with leverage at home.<sup>147</sup> Walmart's refusal to join thirty other clothing retailers in a binding safety agreement following the Rana Plaza factory collapse in Bangladesh, for example, prompted OUR Walmart to incorporate the issue into its chants and champion international anti-sweatshop advocates.<sup>148</sup> The group's justification for opposing Rob Walton's reelection to the company chair, further, revolved around a bribery scandal in Mexico.<sup>149</sup>

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143. Micah Uetrict, *Strike Supporters Shut Down Illinois Walmart Warehouse*, LAB. NOTES (Oct. 2, 2012), <http://labornotes.org/2012/10/strike-supporters-shut-down-illinois-walmart-warehouse> [<http://perma.cc/83GK-B7TH>]; Logan, *supra* note 9, at 24 n.4; *see also* Josh Eidelson, *Freezing for Wal-Mart: Sub-Zero Warehouse Temperatures Spur Indiana Work Stoppage*, SALON (Jan. 13, 2014, 12:40 PM), [http://www.salon.com/2014/01/13/freezing\\_for\\_wal\\_mart\\_sub\\_zero\\_warehouse\\_temperatures\\_spur\\_indiana\\_work\\_stoppage](http://www.salon.com/2014/01/13/freezing_for_wal_mart_sub_zero_warehouse_temperatures_spur_indiana_work_stoppage) [<http://perma.cc/HQ9A-BYET>] (reporting a 2014 WWJ-led Indiana strike over freezing conditions in warehouses).

144. Slaughter, *supra* note 138.

145. *See* Nancy Cleeland et al., *Scouring the Globe to Give Shoppers an \$8.63 Polo Shirt*, L.A. TIMES (Nov. 24, 2003), <http://articles.latimes.com/2003/nov/24/business/fi-walmart24> [<http://perma.cc/ZM9A-LVL2>].

146. Josh Eidelson, *Global Day of Action Hits Walmart in 10 Countries*, NATION (Dec. 14, 2012), <http://www.thenation.com/article/global-day-action-hits-walmart-10-countries> [<http://perma.cc/VRL8-5KZ3>]. The relationships have paid more subtle dividends as well. OUR Walmart's partnership with the international union federation UNI sparked creation of the Global Union Alliance@Walmart, which has worked with unionized Walmart workers outside of the United States to push the company to sign a multinational labor standards accord. *Id.*; Logan, *supra* note 9, at 26. In South Africa the Global Union Alliance slowed and successfully attached conditions to Walmart's bid to take over a local chain, and in Sweden OUR Walmart used the company's track record to convince pension funds to divest \$140 billion of the corporation's stock. Logan, *supra* note 9, at 26–27.

147. *See* Logan, *supra* note 9, at 26–27; Elizabeth A. Harris, *After Bribery Scandal, High-Level Departures at Walmart*, N.Y. TIMES (June 4, 2014), <http://www.nytimes.com/2014/06/05/business/after-walmart-bribery-scandals-a-pattern-of-quiet-departures.html> [<http://perma.cc/QW5H-KVJR>].

148. James Brudney & Catherine Fisk, *Wal-Mart, Gap Skirt the Issue*, L.A. TIMES (May 17, 2013), <http://articles.latimes.com/2013/may/17/opinion/la-oe-fisk-bangladesh-apparel-accord-20130517> [<http://perma.cc/D5JJ-L5BB>]; Eidelson, *supra* note 120.

149. *Letter to Shareholders*, OUR WALMART (May 20, 2014), <http://www.scribd.com/doc/226529743/2014-OUR-Walmart-Shareholder-Letter> [<http://perma.cc/HFX7-LPU2>].

### C. Fast Food

The fast-food campaign came into media focus just as the OUR Walmart walkouts emerged, and it is often viewed as the Walmart campaign's counterpart. In some ways this makes sense—the fast-food offensive targets equally low-wage work and relies heavily on strikes. But the fast-food effort is better viewed as the Walmart campaign's complement, not its twin, for there are important differences between the two.

Most notably, while UFCW set its sights on one employer, the other funder, SEIU, took on an entire industry of employers. The workers within that industry, moreover, are “fissured” from the corporate behemoths at the campaign's center, employed instead by thousands of small businesses scattered throughout the country.<sup>150</sup> Of the over 35,000 McDonald's restaurants, for example, less than a fifth are actually owned by the McDonald's Corporation.<sup>151</sup> The rest are operated by and on the books of franchisees that, in theory and absent special circumstances, immediately control and are legally responsible for working conditions.<sup>152</sup> Lastly, unlike OUR Walmart, the fast-food campaign's endgame has been well defined from the start. It can mobilize for narrow, worksite-specific changes with the best of them, but at its core the fast-food campaign wants \$15 and a union.<sup>153</sup> There are three main facets to its work: (1) mobilizing workers through city-by-city campaigns for one-day work stoppages; (2) organizing to increase the minimum wage, and (3) applying global pressure on the industry through international allies.

#### 1. Fast Food Forward, the Fight for \$15, and City-by-City Strike Solidarity

##### a. Origins and Evolution

Most reports trace the origins of the fast-food campaign to the work of a New York City advocacy group, New York Communities for Change, which had been canvassing neighborhoods for school reform but shifted to low pay “after hearing fast-food jobs were keeping local residents poor.”<sup>154</sup> The Chicago organization Action Now made a similar switch around the same time, opting to organize around the service industry instead of transportation issues

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150. See David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 *ECON. & LAB. REL. REV.* 33, 36–37 (2011).

151. MCDONALD'S CORP., ANNUAL REPORT (FORM 10-K) (Feb. 24, 2015).

152. *Id.* at 4.

153. William Finnegan, *Dignity*, *NEW YORKER* (Sept. 15, 2014), <http://www.newyorker.com/magazine/2014/09/15/dignity-4> [<http://perma.cc/2KDQ-2CST>].

154. Erika Eichelberger, *How Those Fast-Food Strikes Got Started*, *MOTHER JONES* (Dec. 5, 2013, 8:24 PM), <http://www.motherjones.com/politics/2013/12/how-fast-food-strikes-started> [<https://perma.cc/Z4QU-F966>]; Leslie Patton, *Fast-Food Strikes Expand Across U.S. to 50 Cities*, *BLOOMBERG BUS.* (Aug. 28, 2013, 9:00 PM), <http://www.bloomberg.com/news/articles/2013-08-29/fast-food-strikes-expand-across-u-s-to-50-cities> [<http://perma.cc/JC8D-Q5KE>].

after doorstep conversations kept circling back to bad jobs.<sup>155</sup> Though some specifics behind these accounts are disputed,<sup>156</sup> no one questions SEIU's support for both projects or that, after only a few months, the efforts were linked, snappily branded—"Fast Food Forward" in New York and "Fight for \$15" in Chicago—and even had a theme song.<sup>157</sup>

From there, it did not take long for the fast-food campaign to take shape. At its epicenter were and remain city-wide work stoppages that last a single day, repeat, and gradually expand to more and more cities.<sup>158</sup> The opening salvo can be traced to New York and the morning of November 29, 2012, when two hundred workers at McDonald's, Burger King, Domino's, KFC, Taco Bell, Wendy's, and Papa John's shut off the fryers, walked away from cash registers, and joined sidewalk shouts of "Hey, hey, ho, ho, seven-twenty-five has got to go."<sup>159</sup>

They struck again the following April, doubling the number of participants to four hundred. After protesting outside seventy stores across Manhattan and Brooklyn, the strikers made their way to a Harlem McDonald's wearing "I AM A MAN" placards to honor the forty-fifth anniversary of Martin Luther King, Jr.'s assassination.<sup>160</sup> Chicago's Fight for \$15 entered the fray soon after with an estimated five hundred strikers from an expanded employer list that included a smattering of retail outlets.<sup>161</sup>

Then the campaign went national. On May 8, 2013, workers from "STL Can't Survive on \$7.35" quit work at Hardee's, Domino's, Jimmy John's, and

155. Josh Eidelson, *Fast Food Walkout Planned in Chicago*, SALON (Apr. 23, 2013, 6:45 PM), [http://www.salon.com/2013/04/24/fast\\_food\\_walkout\\_planned\\_in\\_chicago](http://www.salon.com/2013/04/24/fast_food_walkout_planned_in_chicago) [<http://perma.cc/DC2Z-37HA>].

156. One account has New York Communities for Change's initial canvass revolving around housing and police conduct. Jenny Brown, *Fast Food Strikes: What's Cooking?*, LAB. NOTES (June 24, 2013), <http://www.labornotes.org/2013/06/fast-food-strikes-whats-cooking> [<http://perma.cc/5P74-PZ4S>]. Another claims that SEIU always directed the campaign and always had fast food at its center. Gupta, *supra* note 25.

157. Brown, *supra* note 156; Trish Kahle, *Betting on Militancy*, JACOBIN (Oct. 22, 2013), <https://www.jacobinmag.com/2013/10/beyond-fast-food-strikes> [<https://perma.cc/8NCM-9QXU>]; *Higher Pay for a Stronger New York!*, FAST FOOD FORWARD, [fastfoodforward.org/petition](http://fastfoodforward.org/petition) (last visited Mar. 4, 2016); Fightfor15, *Fight for it—A.D. Arsonisto, Brittany & LV—Produced by Kore*, YOUTUBE (Nov. 22, 2012), <http://www.youtube.com/watch?v=hAOxWHeJq2Q&feature=kp> [<https://perma.cc/XN8V-CXZR>].

158. Ben Penn, *Fast Food Workers Walk Off Jobs in 150 U.S. Cities, As Campaign Escalates*, DAILY LAB. REP. (May 15, 2014), [http://news.bna.com/dlln/display/display\\_batch\\_print\\_display.adp?searchid=26001778](http://news.bna.com/dlln/display/display_batch_print_display.adp?searchid=26001778) [<https://perma.cc/4FYD-RY55>].

159. Greenhouse, *supra* note 10; *see also* Eidelson, *supra* note 11.

160. Steven Greenhouse, *Fast-Food Workers Plan Second Strike for More Pay*, N.Y. TIMES (Apr. 4, 2013), <http://www.nytimes.com/2013/04/04/nyregion/fast-food-workers-plan-second-strike-for-more-pay.html> [<http://perma.cc/86SR-DBBN>]; Josh Eidelson, *Fast Food Workers Plan Surprise Strike*, SALON (Apr. 4, 2013), [http://www.salon.com/2013/04/04/fast\\_food\\_workers\\_plan\\_surprise\\_strike](http://www.salon.com/2013/04/04/fast_food_workers_plan_surprise_strike) [<http://perma.cc/TF7N-36LF>]; Ned Resnikoff, *Historic Fast Food Strike Draws Lessons from MLK's Last Campaign*, MSNBC (Apr. 4, 2013), <http://www.msnbc.com/all-in/historic-fast-food-strike-draws-lessons> [<http://perma.cc/MWV7-S379>].

161. Eidelson, *supra* note 155; Shropshire & Nix, *supra* note 12.

other St. Louis restaurants.<sup>162</sup> Two days later, a Congressman rallied four hundred workers at McDonald's, Long John Silver's, Popeye's, and other restaurants in Detroit.<sup>163</sup> More May walkouts followed in Milwaukee (the "Raise UP MKE" campaign) and Seattle (from "Good Jobs Seattle").<sup>164</sup> Days before Labor Day brought a sixty-city, thousand-restaurant uprising<sup>165</sup> topped by a hundred-city crescendo in December.<sup>166</sup>

The year 2014 heralded a more aggressive phase. A May demonstration at McDonald's corporate headquarters ended with a mix of one hundred workers, clergy, and union officials in handcuffs.<sup>167</sup> In July, SEIU bussed twelve hundred fast-food workers to a Chicago suburb for a raucous convention knitting the dispersed city efforts together like nothing before. Part rally and part planning session, there, the workers pledged to do "whatever it takes" for \$15 and a union, a vow that became concrete after a unanimous vote to "engage in non-violent direct action" going forward.<sup>168</sup> That future arrived the morning of September 4, 2014, when 456 workers were arrested in New York, Chicago, Detroit, Las Vegas, and thirty-two other cities for "sit-ins" blocking traffic near restaurants.<sup>169</sup> The campaign pressed repeat three months later as the protests broadened in scope with the participation of low-wage airport and

162. Annie Shields, *Fast Food Workers Strike in St. Louis*, NATION (May 9, 2013), <http://www.thenation.com/article/fast-food-workers-strike-st-louis> [<http://perma.cc/FHW2-ECG9>].

163. Josh Eidelson, *Fast Food Strike Wave Spreads to Detroit*, NATION (May 10, 2013), <http://www.thenation.com/article/fast-food-strike-wave-spreads-detroit> [<http://perma.cc/2XGC-7CPQ>].

164. Josh Eidelson, *Fast Food Strikes Hitting Fifth City: Milwaukee*, SALON (May 15, 2013), <http://www.thenation.com/article/fast-food-strikes-hitting-fifth-city-milwaukee> [<http://perma.cc/A2VY-SGY6>]; Christine Clarridge & Erik Lacitis, *Fast-Food Workers Demonstrate for Better Pay*, SEATTLE TIMES (May 31, 2013, 3:33 PM), <http://www.seattletimes.com/seattle-news/fast-food-workers-demonstrate-for-better-pay> [<http://perma.cc/G4DR-WP4P>].

165. Tiffany Hsu & Alana Semuels, *Fast-Food Workers Across U.S. Rally for \$15 Hourly Pay*, L.A. TIMES (Aug. 29, 2013), <http://articles.latimes.com/2013/aug/29/business/la-fi-fast-food-protest-20130830> [<http://perma.cc/CYD6-98RA>].

166. Steven Greenhouse, *Wage Strikes Planned at Fast-Food Outlets*, N.Y. TIMES (Dec. 1, 2013), <http://www.nytimes.com/2013/12/02/business/economy/wage-strikes-planned-at-fast-food-outlets-in-100-cities.html> [<http://perma.cc/XM2Z-7HEY>].

167. Leslie Patton, *McDonald's Workers Arrested at Protest Near Headquarters*, BLOOMBERG BUS. (May 22, 2014, 7:21 AM), <http://www.bloomberg.com/news/articles/2014-05-21/mcdonald-s-tells-employees-to-stay-home-as-protests-loom> [<http://perma.cc/U6K9-GQ6F>].

168. Finnegan, *supra* note 153; Steven Greenhouse, *Fast-Food Workers Intensify Fight for \$15 an Hour*, N.Y. TIMES (July 27, 2014), <http://www.nytimes.com/2014/07/28/business/a-big-union-intensifies-fast-food-wage-fight.html> [<http://perma.cc/7DNJ-8E9Z>]; Ben Penn, *To Unions, McDonald's Joint Employer Status No Slam Dunk, as Fast Food Push Intensifies*, DAILY LAB. REP. (Sept. 18, 2014), <http://www.bna.com/unions-mcdonalds-joint-n17179895030> [<http://perma.cc/N7Y7-MVCC>].

169. Steven Greenhouse, *Hundreds of Fast-Food Workers Striking for Higher Wages Are Arrested*, N.Y. TIMES (Sept. 4, 2014), <http://www.nytimes.com/2014/09/05/business/economy/fast-food-workers-seeking-higher-wages-are-arrested-during-sit-ins.html> [<http://perma.cc/YRK4-FSS8>]; Leslie Patton & Craig Giammona, *Fast-Food Protesters Arrested as Wage Campaign Escalates*, BLOOMBERG BUS. (Sept. 4, 2014, 3:05 PM), <http://www.bloomberg.com/news/articles/2014-09-04/fast-food-protesters-arrested-outside-mcdonald-s-in-times-square> [<http://perma.cc/9TFT-KGB3>].

convenience store strikers and the incorporation of police brutality as another animating issue.<sup>170</sup>

The next year produced a coalescence, with most of the city groups rallying under the “Fight for \$15” banner and organizational website, [fightfor15.org](http://fightfor15.org).<sup>171</sup> It was soon clear that this was more than a catchy battle cry, as, before long, a strike promoted as “the largest low-wage worker mobilization in modern history” was slated for the undeniably savvy date of April 15 (i.e., “fo[u]r 15”).<sup>172</sup> The day marked a pivot point of sorts, from fast-food activism specifically to low-wage work resistance generally, with police reform, environmental, college adjunct, childcare, and other groups fully participating.<sup>173</sup>

In between the mass stoppages, SEIU has taken a page from OUR Walmart by working to spread awareness of its efforts and the issues involved using cyberspace.<sup>174</sup> The campaign’s many Facebook pages urge employees and their supporters to post workplace stories and encourage activists to adopt city-specific usernames on Twitter so that it can monitor the campaign’s spread.<sup>175</sup> Quirky Twitter hashtags like “#McHungerGames” add an air of hipness to the media content.<sup>176</sup> And like their Walmart counterparts, fast-food workers have access to an online “strike kit,” which has helped many strike at stores where fast-food organizers have not been able to penetrate.<sup>177</sup>

170. Melanie Trotman, *Low-Wage Workers Stage Strikes and Protests Over Pay*, WALL ST. J. (Dec. 4, 2014, 12:22 PM), <http://www.wsj.com/articles/low-wage-workers-stage-strikes-and-protests-over-pay-1417713773> [<http://perma.cc/86Q6-4HK6>].

171. FIGHT FOR \$15, <http://fightfor15.org> (“1,000s of workers. 100s of cities. 1 movement.”) (last visited Mar. 4, 2016).

172. David Moberg, *Workers Say the Fight for 15 Isn’t Just About Raises—It’s a Fight for Meaning in Their Lives*, THESE TIMES (Apr. 1, 2015), [http://inthesetimes.com/working/entry/17801/workers\\_say\\_the\\_fight\\_for\\_15\\_isnt\\_just\\_about\\_raisesits\\_a\\_fight\\_for\\_meaning](http://inthesetimes.com/working/entry/17801/workers_say_the_fight_for_15_isnt_just_about_raisesits_a_fight_for_meaning) [<http://perma.cc/VM72-U94N>].

173. *Id.*; Steven Greenhouse & Jana Kasperkevic, *Fight for \$15 Swells into Largest Protest by Low-Wage Workers in US History*, GUARDIAN (Apr. 15, 2015, 5:40 PM), <http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston> [<http://perma.cc/GT8S-SXYA>] (“The Fight for \$15 movement started with fast-food workers . . . but its strategists have maneuvered to transform it into a broad movement of low-wage workers.”); Ned Resnikoff, *Fight for \$15 Goes Global: Workers Set to Launch Worldwide Protest*, AL JAZEERA AM. (Apr. 14, 2015, 8:30 AM), <http://america.aljazeera.com/articles/2015/4/13/laborers-set-to-launch-worldwide-protest-for-a-living-wage.html> [<https://perma.cc/758D-CWWZ>] (“As the movement has grown in size, it has also attracted supporters from beyond organized labor.”).

174. Dan Orlando, *Fast-Food Strike Strategy: No Burger Flipping, but Lots of Tweeting*, N.Y. BUS. J. (Aug. 28, 2013, 11:33 AM), <http://www.bizjournals.com/newyork/news/2013/08/22/fast-food-strike-set-to-launch-across.html> [<http://perma.cc/2DRE-3E3U>].

175. *Id.*

176. Fast Food Forward (@FastFoodForward), TWITTER (May 14, 2014, 2:45 PM), <https://twitter.com/fastfoodforward/status/466695812203155457> [<https://perma.cc/M3X6-P95Q>] (using #McHungerGames).

177. The fast-food strike kit urges workers “tired of getting screwed by low pay” to “join the national movement and go on a one-day strike!” *Strike Kit*, LOW PAY IS NOT OK, <http://lowpaysnotok.org/strike-kit> (last visited Aug. 12, 2014). The kit’s “15 steps” to striking includes

The kit has also empowered workers to spearhead isolated actions in response to store-specific issues. Broken air conditioning on scorching summer afternoons sparked spontaneous walkouts in both Manhattan and Chicago, for example, while a group of Whole Foods workers struck when a coworker was fired for staying home with her son amidst the “polar vortex” of 2014 that closed many schools.<sup>178</sup>

Through it all, the press has taken great interest in the ins and outs of fast-food workers’ daily lives. Comedy Central’s “The Colbert Report” guest featured KFC employee Naquasia LeGrand, and the *New Yorker* has twice shadowed individual workers for long-form magazine profiles.<sup>179</sup> Prominent food journalists Michael Pollan and Eric Schlosser have also been outspoken, urging the “food movement” to recognize that sustainable eating requires sustainable wages.<sup>180</sup>

*b. “\$15 and a Union”: The Public and Practical Context*

The energetic press response may be related to the campaign’s well-defined goals. Though the exact words sometimes vary, the campaign’s central premise has been solid from the start: a \$15-an-hour fast-food wage backed up by a union contract.<sup>181</sup> Since most of the industry pays the minimum, the concrete wage demand in particular is provocative, easy to explain, and plays to a policy change that the public and progressive politicians generally support

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a sample letter for management setting forth the “\$15 an hour and the right to form a union” demands and encourages workers to “[c]all the local TV station” and to “[m]ake signs that say why you are on strike.” *Id.*

178. Josh Eidelson, “Dizzy and Sick”: McDonald’s Workers Strike After Enduring 110 Degree Heat, SALON (July 19, 2013, 1:35 PM), [http://www.salon.com/2013/07/19/dizzy\\_and\\_sick\\_mcdonalds\\_workers\\_strike\\_after\\_enduring\\_110\\_degree\\_heat](http://www.salon.com/2013/07/19/dizzy_and_sick_mcdonalds_workers_strike_after_enduring_110_degree_heat) [<http://perma.cc/79MA-AFSS>]; Josh Eidelson, *That’s Cold, Whole Foods: Polar Vortex Firing Spurs Chicago Strike*, SALON (Feb. 5, 2014, 6:42 AM), [http://www.salon.com/2014/02/05/thats\\_cold\\_whole\\_foods\\_polar\\_vortex\\_firing\\_spurs\\_chicago\\_strike](http://www.salon.com/2014/02/05/thats_cold_whole_foods_polar_vortex_firing_spurs_chicago_strike) [<http://perma.cc/EB4L-H22X>].

179. Naquasia LeGrand, COLBERT REP. (Jan. 16, 2014), <http://thecolbertreport.com/videos/4g3c4f/naquasia-legrand> [<https://perma.cc/4FK4-764H>]; Sasha Abramsky, *The Life of a Fast-Food Striker*, NEW YORKER (Dec. 20, 2013), <http://www.newyorker.com/business/currency/the-life-of-a-fast-food-striker> [<http://perma.cc/X3MU-KCPP>] (shadowing Shonda Roberts); Finnegan, *supra* note 153 (shadowing Arisleyda Tapia); see also Michael Powell, *Making \$7.75 an Hour, and Figuring There’s Little to Lose by Speaking Out*, N.Y. TIMES (July 1, 2013), <http://www.nytimes.com/2013/07/02/nyregion/making-7-75-an-hour-and-figuring-theres-little-to-lose-by-speaking-out.html> [<http://perma.cc/KNG4-WQKA>] (profiling KFC employee Shenita Simon). The campaign was also the subject of one of the *New Yorker’s* famous cartoons. Paul Noth, *Daily Cartoon: Thursday, December 5th*, NEW YORKER (Dec. 5, 2013), <http://www.newyorker.com/cartoons/daily-cartoon/daily-cartoon-thursday-december-5th> [<http://perma.cc/6XZH-XFBS>].

180. Joe Garofoli, *Influential Voices in Food Movement Seek Better Worker Wages*, SFGATE (Dec. 25, 2013, 3:06 PM), <http://www.sfgate.com/politics/joegarofoli/article/Influential-voices-in-food-movement-seek-better-5091843.php> [<http://perma.cc/G7CM-VU3Q>].

181. Finnegan, *supra* note 153.

(the precise scope of the increase aside).<sup>182</sup> Also, because states and even some cities can establish their own wage floors, the call to raise it drastically allowed the campaign to localize its activities and messaging to a great extent.<sup>183</sup>

The media's tendency to devote the lion's share of coverage to the wage demand in particular also demonstrates its special salience. Stories frequently either fail to mention bargaining as a worker aspiration or essentialize the campaign solely as a wage movement.<sup>184</sup> No doubt contributing to the situation was the media's initial difficulty in finding anyone to say that unionizing the fast-food industry was a likely or, frankly, realistic aim. Reporter Josh Eidelson, who has provided the most sustained coverage of the strikes, wrote in late 2013 that "seasoned pro-labor observers" viewed "[a]ctual collective bargaining in fast food . . . as an impossible goal," something labor leaders themselves did not exactly deny.<sup>185</sup> SEIU's key campaign strategist called the approach "brand new" and "certainly not fleshed out."<sup>186</sup> A renowned labor historian was more direct: "[T]he unions have no strategy for building a real organization sustained by actual dues-paying members."<sup>187</sup>

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182. In cities like Chicago, fast-food workers are uniformly paid the state minimum wage. Meyerson, *supra* note 125; see also Bruce Drake, *Polls Show Strong Support for Minimum Wage Hike*, PEW RES. CTR. (Mar. 4, 2014), <http://www.pewresearch.org/fact-tank/2014/03/04/polls-show-strong-support-for-minimum-wage-hike> [<http://perma.cc/PKH6-CZUP>].

183. A California shopping mall that straddles two cities and is subject to two different minimum wages represents this fact powerfully. Steve Henn, *A Mall with Two Minimum Wages*, NPR (Aug. 28, 2014), <http://www.npr.org/sections/money/2014/08/28/343430393/a-mall-with-two-minimum-wages> [<http://perma.cc/5EZA-KTQE>].

184. The *New York Times*, for instance, frequently uses bold headlines to depict the effort of a wage campaign while describing the unionization demand in the main text almost as an afterthought. See, e.g., Greenhouse, *supra* note 10; Greenhouse, *supra* note 160; Greenhouse, *supra* note 166. Other publications also link the strikes primarily to wages. See, e.g., Josh Sanburn, *Fast Food Strikes: Unable to Unionize, Workers Borrow Tactics From 'Occupy,'* TIME (July 30, 2013), <http://business.time.com/2013/07/30/fast-food-strikes-unable-to-unionize-workers-borrow-tactics-from-occupy> [<http://perma.cc/3NNN-XHYU>] ("This week's walk-outs seem less about truly unionizing . . . and more about building public momentum for a higher minimum wage."); Alana Semuels, *Fast-Food Workers Again Protest for Higher Wages*, L.A. TIMES (Apr. 4, 2013), <http://articles.latimes.com/2013/apr/04/news/la-mo-fast-food-workers-20130404> [<http://perma.cc/6A9Y-VGSG>]; Bruce Horovitz et al., *Fast Food Workers Rally for Higher Wages*, USA TODAY (May 15, 2014, 5:26 PM), <http://www.usatoday.com/story/money/business/2014/05/15/fast-food-workers-strike/9114245> [<http://perma.cc/N5YC-FQS7>]; Joe Garofoli, *Fast-Food Workers Set to Strike over Wages*, SFGATE (May 13, 2014, 5:22 PM), <http://www.sfgate.com/politics/joegarofoli/article/Fast-food-workers-set-to-strike-over-wages-5475525.php> [<http://perma.cc/RAB6-CJ77>].

185. Josh Eidelson, *Fast Food Strikes to Massively Expand: "They're Thinking Much Bigger,"* SALON (Aug. 14, 2013, 4:43 AM), [http://www.salon.com/2013/08/14/fast\\_food\\_strikes\\_massively\\_expanding\\_theyre\\_thinking\\_much\\_bigger](http://www.salon.com/2013/08/14/fast_food_strikes_massively_expanding_theyre_thinking_much_bigger) [<http://perma.cc/U9CL-C9R7>].

186. *Id.*

187. Nelson Lichtenstein, *Two Roads Forward for Labor: The AFL-CIO's New Agenda*, DISSENT MAG. (Winter 2014), <https://www.dissentmagazine.org/article/two-roads-forward-for-labor-the-afl-cios-new-agenda> [<http://perma.cc/TW7K-5M7D>]; see also Meyerson, *supra* note 125 (describing the campaign as attracting "a multitude of workers [unions] won't plausibly claim as members for many years, if ever").

The ambiguity goes back to the difficulty of forming a union and bargaining with any employer, let alone with thousands upon thousands across an entire industry.<sup>188</sup> While SEIU has actually had some previous success organizing the high-rise janitorial sector, those campaigns were limited to a single city at a time and were not complicated by a sprawling franchise structure scattering deeply committed anti union brands into little businesses around the country.<sup>189</sup> Getting McDonald's, for instance, to accept unionization in principle and then impose that decision on the legally distinct franchisees that actually employ the workers would require, as SEIU leadership openly acknowledged, "things we haven't imagined."<sup>190</sup>

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188. See *supra* note 42.

189. The fast-food franchise system is in some ways similar to the office-cleaning contractors SEIU targeted in its "Justice for Janitors" (JfJ) campaigns. The contractors, like franchisees, were linked by contract to bigger corporate actors—building owners—who could ultimately be pressured to push the contractors into unionization. RICK FANTASIA & KIM VOSS, *HARD WORK* 139–41 (2004). But there are also key differences. By design JfJ had a limited geography. Campaigns would begin and end in a single city before moving elsewhere, often years later. *Id.* at 136–37, 139. The earliest efforts also benefitted greatly both from the presence of a single janitorial firm that controlled nearly the entire industry, along with the fact that SEIU had already unionized the company in other parts of the country, offering a key relational in-road and the chance to exert highly organized pressure. *Id.* at 143–44. Later incarnations involved a greater variety of targets and required a more complex strategy but were similarly limited to a single geography and involved far fewer workers than the fast-food campaign. Compare Sachs, *supra* note 44, at 379–80 (describing a Houston campaign with five contractors, 4,700 workers, and a special "trigger" agreement), with Finnegan, *supra* note 153 (comparing JfJ and the fast-food campaign and noting that "the fast-food workforce is just under four million and growing"). Finally, sociologists have written about the unique social vulnerabilities of high-rise building owners, sensitivities that public relations-hardened fast-food companies probably do not share. FANTASIA & VOSS, *supra*, at 140.

190. Josh Eidelson, *supra* note 185; see also Harold Meyerson, *Seattle's \$15 Minimum Wage Agreement: Collective Bargaining Reborn?*, AM. PROSPECT (May 7, 2014), <http://prospect.org/article/seattles-15-minimum-wage-agreement-collective-bargaining-reborn> [<http://perma.cc/6V4N-LWZ9>] ("[I]t was never even remotely apparent how SEIU could persuade chains such as McDonald's and Burger King to enter into contractual relations with the hundreds of thousands of workers employed in their franchises."). Something the campaign did eventually come up with was a push in 2014 to have franchisees and franchisors classified as co- or joint-employers under the NLRA. See Lawrence E. Dube, *NLRB General Counsel Acts on McDonald's, Moving 181 Cases on Joint Employer Issue*, DAILY LAB. REP. (July 29, 2014), <http://www.bloomberg.com/news/articles/2014-07-29/nlr-determines-that-mcdonald-s-is-employer-to-franchise-workers> [<https://perma.cc/CQ3Y-4HD3>]. The theory here is that contractual provisions and de facto rules franchisors force on franchisees for things like wages, work schedules, and hiring merge the two when it comes to legal responsibility for on-the-ground labor law violations. *Id.* While the unionization implications that arise under such a finding are not entirely clear—that Walmart Stores, Inc. operates all of its locations has not exactly been a silver bullet for UFCW—it would prevent the corporate parents from disclaiming responsibility for law-breaking in the stores and up the rhetorical and legal pressure on franchisors to agree to talks on everything from setting a uniform industry pay rate, to not opposing unionization and making that stance a condition of the franchise agreement, to aggregating franchisees into coherent bargaining units. See Penn, *supra* note 168; see also Julia Kann, *McDonald's Can't Hide Behind Franchise System*, LAB. NOTES (Aug. 18, 2014), <http://www.labornotes.org/2014/08/mcdonald%E2%80%99s-can%E2%80%99t-hide-behind-franchise-system> [<http://perma.cc/7LZU-752T>]; Noam Scheiber, *Union Takes a McDonald's Challenge Overseas*, N.Y. TIMES (Aug. 19, 2015), <http://www.nytimes.com/2015/08/20/business/union-takes-a-mcdonalds-challenge-overseas.html> [<http://perma.cc/UVA6-ZBEE>] ("A joint employer determination would make it easier to apply any

But if the way to win the “union” part of the campaign’s dual demands is a bit murky, the “\$15” goal is not. Indeed, much of the campaign’s work beyond strikes has focused on increasing the minimum wage across all industries anywhere it can, with some notable success.

## 2. *Minimum Wage Activism*

Proposals to adjust the federal minimum wage have languished in Congress since it last authorized an increase in 2007. But inclusion of the issue in the 2013 State of the Union address coincided with widespread and occasionally successful attempts to raise it at the state level, which continue to this day.<sup>191</sup> The fast-food campaign has contributed to these moves in a couple of ways. For one, a number of commentators have suggested that the campaign’s strikes and demonstrations create an atmosphere that provides crucial momentum to wage activists and politicians around the country.<sup>192</sup>

More directly, the campaign has aggressively inserted itself into many ongoing efforts to increase state and local minimums, work that has paid amazing dividends, for starters, in and around Seattle.<sup>193</sup> There, SEIU floated a trial balloon in the form of a \$15-an-hour ballot proposition in the tiny city of

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concession workers wrested from the McDonald’s Corporation to workers at McDonald’s franchises, including, for example, a card-check provision that could bring a union into existence at a store once a majority of workers signed union cards.”). The strategy got a serious boost in late August 2015 when the NLRB loosened the test for determining joint employer status by considering a company like McDonald’s an employer of franchise workers if it has the power—even indirectly and even if it does not actually “exercise the authority”—to “share or codetermine” employment conditions. *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186, \*2 (2015). For a comprehensive and recent account of the ways that SEIU might approach the unionization issue, see Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540> [<http://perma.cc/ZN3Q-9Y7V>] (describing recognition agreements, hiring halls, and traditional NLRB campaigns targeted at corporate-owned stores as potential options).

191. Michael D. Shear, *After Push by Obama, Minimum-Wage Action Is Moving to the States*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/us/politics/president-heads-to-michigan-to-press-minimum-wage-increase.html> [<http://perma.cc/ZN3Q-9Y7V>] (“In the last 14 months, since Mr. Obama first called for the wage increase in his 2013 State of the Union address, seven states and the District of Columbia have raised their own minimum wages, and 34 states have begun legislative debates on the matter.”).

192. Ned Resnikoff, *How Low-Wage Strikes Helped Change the Conversation in Washington*, MSNBC (Jan. 30, 2014, 2:06 PM), <http://www.msnbc.com/all-2> [<https://perma.cc/BZV6-764M>] (quoting Columbia University political scientist Dorian Warren: “If we hadn’t had this year of these one-day strikes, we would not be having this conversation [about the minimum wage] . . . [T]hese strikes and protests are agenda-setting . . .”); Tierney Sneed, *Fast-Food Workers to Strike to Super-Size Their Wages*, U.S. NEWS & WORLD REP. (Sept. 3, 2014, 7:00 AM), <http://www.usnews.com/news/articles/2014/09/03/fast-food-restaurant-strike-plays-into-larger-minimum-wage-battle> [<https://perma.cc/K9HM-FPEV>] (quoting President Obama: “[R]ight now there’s a national movement . . . of fast-food workers organizing to lift wages . . . There is no denying a simple truth: America deserves a raise”).

193. Danny Westneat, *Unions Are Back with City-by-City Wage Campaign*, SEATTLE TIMES (May 3, 2014, 8:01 PM), <http://www.seattletimes.com/seattle-news/unions-are-back-with-city-by-city-wage-campaign> [<http://perma.cc/RT8F-UAM8>].

SeaTac surrounding the Seattle-Tacoma Airport.<sup>194</sup> After a hard-fought campaign marked by a number of legal twists and turns, the measure passed by seventy-seven votes, providing sixteen hundred workers with what was at the time the highest wage floor in the nation.<sup>195</sup>

Organizers then moved on to Seattle, where SEIU timed strikes to coincide with the mayoral election and helped organize candidate forums hosted in part by downtown fast-food workers, who asked the questions.<sup>196</sup> When then-State Senator Ed Murray enthusiastically backed a citywide \$15 minimum wage, SEIU and the workers had their candidate.<sup>197</sup>

The union's local chapters worked to keep a spotlight on the issue prior to Election Day. Murray, for his part, argued that the increase was politically viable when paired with a proposal tasking a business-labor partnership to come up with specifics both constituencies could support.<sup>198</sup> Murray won, the partnership succeeded, and Seattle's fast-food workers—along with around one hundred thousand others—got their \$15 an hour.<sup>199</sup>

SEIU has since transported this strategy to other cities.<sup>200</sup> In New York, lawmakers introduced a bill mandating a \$15 hourly wage at “restaurants with at least eleven locations nationwide, including their franchisees,” a definition tailored to the quick service industry.<sup>201</sup> When that effort stalled, the campaign pressed the governor to authorize a “wage board” to study fast-food pay, which ultimately led to a binding recommendation that the state mandate \$15 an hour in the industry.<sup>202</sup> Elsewhere, city councils and statehouse hearing rooms have been packed with testimonials about the importance of raising the wage floor in

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194. Kirk Johnson, *Voters in SeaTac, Wash., Back \$15 Minimum Wage*, N.Y. TIMES (Nov. 26, 2013), <http://www.nytimes.com/2013/11/27/us/voters-in-seatac-wash-back-15-minimum-wage.html> [<http://perma.cc/5JFF-AD9U>].

195. *Id.*; Amy Martinez, *\$15 Wage Floor Slowly Takes Hold in SeaTac*, SEATTLE TIMES (June 3, 2014, 2:39 PM), <http://www.seattletimes.com/seattle-news/15-wage-floor-slowly-takes-hold-in-seatac> [<http://perma.cc/AF53-KXJ7>].

196. Meyerson, *supra* note 190.

197. *Id.*

198. *Id.*

199. *Id.*; Maria L. La Ganga, *Seattle Raises Minimum Wage to \$15 an Hour, Highest in U.S.*, L.A. TIMES (June 2, 2014, 4:06 PM), <http://www.latimes.com/nation/la-na-seattle-minimum-wage-20140602-story.html> [<http://perma.cc/LQ5T-UGKG>] (noting that the increase will be phased in over a number of years); *see also* SEATTLE, WASH., CITY ORDINANCE NO. 124490 (2014) (setting a \$15 minimum wage for franchises by 2017).

200. As summarized by the *Seattle Times*, “the idea is to wage broader, public-spirited campaigns like the \$15 wage fight. So they may start out petitioning for \$15 city by city (first SeaTac, then Seattle, apparently next New York). But the end goal is national. All without involving Congress.” Westneat, *supra* note 193.

201. Kate Taylor, *New York Lawmakers Push to Raise Wages at Biggest Chains*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/nyregion/new-york-lawmakers-push-to-raise-wages-at-biggest-chains.html> [<https://perma.cc/2KRS-YN4A>].

202. Patrick McGeehan, *New York Plans \$15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html> [<http://perma.cc/U6BA-FDV5>].

fast food and beyond. Voters answered the calls in the 2014 midterms when four states increased minimums through the ballot box, and San Francisco became the second city to go all the way up to \$15.<sup>203</sup> Since then, Los Angeles and Emeryville, California, have been added to the list.<sup>204</sup>

The melding of fast-food organizing with minimum wage activism has led some to suggest that the strategy could lead to “collective bargaining reborn” or at least repackaged as a way to “extract changes from local or state governments” instead of from private businesses.<sup>205</sup> The campaign, however, has not been content to limit its work locally or even domestically. It has also sought to pressure fast-food companies from points around the world.

### 3. *Global Partnerships*

Like Walmart, the fast-food industry spans the globe, and by partnering with the IUF (International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations), a massive federation of 396 unions spread over 126 countries, SEIU has been able to expand its efforts far beyond U.S. borders.<sup>206</sup>

The relationship took root in May 2014 when fast-food workers from dozens of countries met with leaders from SEIU and IUF-affiliated unions in New York to organize an international front against the industry. There, participants signed a declaration admonishing McDonald’s labor practices and insisting that it “enter in good faith negotiations with workers’ representatives to raise wages.”<sup>207</sup>

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203. See, e.g., Jennifer Jacobs, *Updated: Iowa Fast Food Worker Testifies About Minimum Wage*, DES MOINES REG. (Mar. 12, 2014, 8:43 AM), <http://blogs.desmoinesregister.com/dmr/index.php/2014/03/12/iowa-fast-food-worker-testifies-to-congress-about-minimum-wage> [<https://perma.cc/AE6Q-RJVQ>]; Marc Lifsher, *Taxpayers Pay High Cost for Low Fast-Food Wages, Lawmakers Are Told*, L.A. TIMES (Nov. 13, 2013), <http://articles.latimes.com/2013/nov/13/business/la-fi-fastfood-wages-20131114> [<http://perma.cc/52X8-EHXG>]; see also Shaila Dewan, *Higher Minimum Wage Passes in 4 States; Florida Defeats Marijuana Measure*, N.Y. TIMES (Nov. 5, 2014), <http://www.nytimes.com/2014/11/05/us/politics/higher-minimum-wages-prove-popular-in-fla-marijuana-is-less-so.html> [<http://perma.cc/ALK9-UWVB>]; Claire Zillman, *Fast Food Workers’ \$15 Demand: How Aiming High Launched a Social Movement*, FORTUNE (Dec. 4, 2014), <http://fortune.com/2014/12/04/fast-food-workers-15-demand-how-aiming-high-launched-a-social-movement> [<https://perma.cc/UAB8-F3SV>] (citing San Francisco’s increase and noting that Chicago lawmakers passed a \$13 minimum wage).

204. George Arnett & Alberto Nardelli, *New York’s \$15 Minimum Wage Would be the Highest in the World*, GUARDIAN (July 25, 2015, 10:31 AM), <http://www.theguardian.com/news/datablog/2015/jul/24/new-york-15-dollar-minimum-wage-highest-in-world> [<https://perma.cc/H3F3-8AQQ>].

205. Meyerson, *supra* note 190; Julia Kann, *Fight for Fifteen Spreads out and Zooms in*, LAB. NOTES (May 15, 2014), <http://labornotes.org/2014/05/fight-fifteen-spreads-out-and-zooms> [<https://perma.cc/J96J-25ZD>].

206. Ben Penn, *Fast Food Campaign to Expand May 15 with Strikes in 150 Cities, Global Protests*, DAILY LAB. REP. (May 7, 2014), [http://news.bna.com/dlln/DLLNWB/split\\_display.adp?fedfid=46370121&vname=dlrnotallissues&wsn=496149500&searchid=27099476&doctypeid=1&type=date&mode=doc&split=0&scm=DLLNWB&pg=0](http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=46370121&vname=dlrnotallissues&wsn=496149500&searchid=27099476&doctypeid=1&type=date&mode=doc&split=0&scm=DLLNWB&pg=0) [<https://perma.cc/XRM3-DS9T>].

207. *Id.*

Days later, fast-food workers from an array of nations coalesced at the entrance of a Manhattan McDonald's, waving flags and leading chants in French, Italian, English, and Arabic.<sup>208</sup> It was foreshadowing for May 15, when U.S. fast-food workers walked out for the first time since December 2013, adding fifty new urban centers to the action list and bringing the total number of cities with strikers up to 150.<sup>209</sup> This time, though, they were supported by simultaneous protests in thirty-three other countries, from a teach-in at a McDonald's corporate office in Auckland to a rally in Seoul to a full-blown work stoppage in Brussels.<sup>210</sup>

Throughout the day, SEIU leaders emphasized that the lack of fast-food unions in the United States made it an outlier on the world stage, where unionized cashiers and fry cooks sometimes make over \$20 an hour.<sup>211</sup> The IUF General Secretary sounded the other theme for the day: SEIU's campaign had "caught the attention of workers around the world"<sup>212</sup> and "this highly profitable global industry better take note."<sup>213</sup>

### III.

#### IMPROVISATIONAL UNIONISM AS A SOCIAL PRACTICE

The Walmart and fast-food campaigns depart, in some self-evident ways, from unions' usual approach to doing things. Prior to 2012, unions had abandoned the strike, worker mobilization was tightly tracked, and organizing was aimed at increasing membership. Unions have long relied on local and global partnerships, policy activism, and strategic political work, but pre-2012 they were generally packaged as part of a "comprehensive campaign" aimed

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208. Ned Resnikoff, *Largest Fast Food Strike Yet Will Include Rallies on 6 Continents*, MSNBC (May 7, 2014), <http://www.msnbc.com/msnbc/the-fast-food-movement-goes-global> [https://perma.cc/BLW6-9G5S].

209. Penn, *supra* note 206.

210. Penn, *supra* note 158.

211. *Id.* ("The international protests . . . called attention to the fact that many fast food employees overseas are already unionized and receive significantly greater pay."); Resnikoff, *supra* note 208; Louise Marie Rantzau, *I'm Making \$21 an Hour at McDonald's. Why Aren't You?*, REUTERS: GREAT DEBATE BLOG (May 15, 2014), <http://blogs.reuters.com/great-debate/2014/05/15/fight-for-15-try-21> [https://perma.cc/GBM8-27HX].

212. Claire Zillman, *Fast-Food Strikes: Why Going Global Could Work*, FORTUNE (May 13, 2014, 3:55 PM), <http://fortune.com/2014/05/13/fast-food-strikes-why-going-global-could-work> [https://perma.cc/Y59U-DA3N].

213. Resnikoff, *supra* note 208. By 2015, the industry was indeed prompted to pay serious attention, with SEIU's research prompting the European Commission to investigate fast-food tax evasion as the Brazilian Senate scrutinized worldwide antitrust allegations and McDonald's faced suits over wage theft and safety violations from two international unions. Scheiber, *supra* note 190; Greenhouse, *supra* note 190; David Moberg, *McDonald's Workers Take Fight for \$15 to Brazil, Accuse Company of "Cannibal Capitalism,"* THESE TIMES (Aug. 24, 2015, 3:30 PM), [http://inthesetimes.com/working/entry/18343/mcdonalds\\_workers\\_take\\_fight\\_for\\_15\\_to\\_brazil\\_accuse\\_company\\_of\\_cannibal\\_ca](http://inthesetimes.com/working/entry/18343/mcdonalds_workers_take_fight_for_15_to_brazil_accuse_company_of_cannibal_ca) [http://perma.cc/Z7VA-V7MM].

with laser-like precision at winning a privately ordered agreement where, again, a prime goal was improving standards by adding members.<sup>214</sup>

Things changed. Since 2012, unions have embraced a strike-first strategy. Mobilization has been unbridled. Increasing membership has been either, in the case of Walmart, not the goal, or in the case of fast food, an unmapped odyssey. Why? This Part gets at that question, introducing improvisation as a social practice and examining its applications in both campaigns.

#### A. *Bold Strands in a Broader Process of Reinvention*

To begin, unions have started a self-conscious process of reinvention that has flirted with some truly radical ideas. Prior to the AFL-CIO's 2013 convention, labor was abuzz with reports that the federation was considering extending internal voting rights to the NAACP and Sierra Club, effectively handing policymaking powers over to nonunion groups.<sup>215</sup> Though ultimately watered down, it is telling that the idea was even seriously raised, as was President Trumka's blunt explanation for the potential move: "[W]e have to change."<sup>216</sup>

Thus, at a basic level, the campaigns against Walmart and fast food are highly visible strands in a broader process. Given their unorthodox methods, they are also especially vulnerable to critique: skeptics wonder if the efforts will amount to much, and cynics from across the spectrum suggest that beneath it all is not much more than a manufactured narrative and a series of flashy actions.<sup>217</sup>

The skepticism is fair; the cynicism is not. Coursing through each campaign are elements that a growing area of academic inquiry has identified as important agents of organizational change. At base, the strikes by nonunion workers, the incitement of third-party activism, and the embrace of experimentalism are tactics of institutional improvisation. After years of fits and starts aimed at internal change, this new improvisational unionism may at least give unions a puncher's chance—maybe their best chance—of through and through reform.

#### B. *Theoretical Foundations*

The shift toward an improvisational ethic did not come from nowhere. Theoretical antecedents exist and have been built upon to reach this point. An

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214. See Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 *FORDHAM L. REV.* 2617, 2621–23 (2011) (defining “comprehensive” union campaigns and their goals).

215. Kris Maher & Melanie Trotman, *AFL-CIO Seeks Answers in Crisis*, *WALL ST. J.* (July 26, 2013, 6:58 PM), <http://www.wsj.com/articles/SB10001424127887323971204578630282137655250> [<http://perma.cc/976F-S4NY>].

216. *Id.*

217. See *supra* notes 25–26.

exploration of improvisational unionism should start there, as much of how the Walmart and fast-food campaigns operate can be traced to three perspectives on union restructuring sketched out in the decade prior to the first strikes. Improvisational unionism borrows elements from each.

In 2002, Professors Richard Freeman and Joel Rogers argued that unions needed to become “open source,” a reference to the tech world philosophy that allows anyone to borrow, alter, or improve upon publicly available software code.<sup>218</sup> The heart of open source is a philosophy of fluid boundaries where individual gifts can be shared to benefit a common whole.<sup>219</sup> The concept has been promoted in a diversity of settings, from church governance to car manufacturing, and the authors believed it could apply to unions.<sup>220</sup> The key to “open source unionism” was counting anyone interested in working with the union on a workplace or community issue as a genuine “member.”<sup>221</sup> This meant that unions would no longer make resource expenditures dependent on the “probability that they could get a collective contract at the place of work.”<sup>222</sup> Instead, unions would offer their services to any worker seeking assistance at any time.<sup>223</sup>

Consequently, mobilization would not be bound by a finite campaign period under an open source regime.<sup>224</sup> Organizing, rather, would continue indefinitely as workers called for help and unions provided it through community pressure, targeted collective action, and political engagement on legislative issues impacting job conditions.<sup>225</sup> In this context Freeman and Rogers saw an important role for the Internet because it offered workers easy access to union staff and allowed unions to provide many services virtually, including, notably, do-it-yourself guides to labor law.<sup>226</sup> One tactic open source unionism did not prioritize was strikes, largely because Freeman and Rogers thought that an open source union without majority workplace support would lack the “clout” to pull off a meaningful stoppage.<sup>227</sup>

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218. Richard B. Freeman & Joel Rogers, *Open Source Unionism: Beyond Exclusive Collective Bargaining*, 5 WORKINGUSA 8, 13 (2002).

219. See LANDON WHITSITT, OPEN SOURCE CHURCH 2 (2011) (defining open source, “[a]t its most basic level,” as “making sure that things can work for everyone”).

220. Freeman & Rogers, *supra* note 218, at 8; Brian Solomon, *Tesla Goes Open Source: Elon Musk Releases Patents to ‘Good Faith’ Use*, FORBES (June 12, 2014), <http://www.forbes.com/sites/briansolomon/2014/06/12/tesla-goes-open-source-elon-musk-releases-patents-to-good-faith-use/print> [<http://perma.cc/8G37-NZF2>]; see WHITSITT, *supra* note 219, at 2 (applying open source to religious congregations).

221. Freeman & Rogers, *supra* note 218, at 18–19.

222. *Id.* at 18.

223. *Id.* at 18–19.

224. *Id.* at 18–22.

225. *Id.* at 14, 22.

226. *Id.* at 19–21.

227. *Id.* at 22; see also *id.* at 14, 16.

In 2006, Professor Charles Heckscher suggested that strikes were exactly what open source unionism was missing.<sup>228</sup> Heckscher accepted that unions needed to broaden the concept of union membership to include all comers, but he thought that they should take advantage of this potentially far-flung base by raising havoc at calculated pressure points around the world.<sup>229</sup>

Here, Heckscher relied on “network theory,” the idea that diverse, informal, scattered groups can successfully confront large entities through “short, rapid, targeted actions” or “swarms.”<sup>230</sup> Central to the model is the assumption that, as companies move from vertically integrated, multifunction enterprises to horizontal firms with a web of contracted relationships, disruptions at any link in the chain can devastate the whole.<sup>231</sup> Union strength thus had less to do with contracts and resources and more to do with the capacity to galvanize a constellation of activists and allied groups at any moment. For Heckscher, the important metric was “not how many members you have, but who you can mobilize.”<sup>232</sup>

Open source unionism’s focus on porous borders and network theory’s emphasis on dispersed relationships left questions about the role of existing members covered by collective bargaining agreements. Jennifer Hill took on this assignment in 2010 by suggesting that unions limit contracts to wage increases and leave day-to-day “shop-floor” fights to members alone.<sup>233</sup> Scaling back agreements would give unions room to operate more like worker centers, focusing scarce resources “on outside-the-shop activities like policy advocacy, participatory research, creative mobilizations, or new organizing.”<sup>234</sup> Hill acknowledged that externalizing efforts in this way was an implicit challenge to the conventional wisdom that union power is generated by internal workplace struggles, but she argued that working toward policy changes that would impact all workers was a better use of resources since there were few unionized shops to begin with.<sup>235</sup>

As a cluster, the projects set the table for a come-one-come-all unionism that would accumulate power through small, surgical, continuous protests—often organized online—and policy work. With the Black Friday and supply chain strikes, one-day walkouts that spread across the nation over time, wage floor advocacy, and lack of emphasis on collective contracts, the Walmart and

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228. See Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 313, 333, 335–36 (2006).

229. *Id.* at 332–34.

230. *Id.* at 318, 322–23, 331–32.

231. *Id.* at 322–23.

232. *Id.* at 335.

233. Jennifer Hill, *Can Unions Use Worker Center Strategies?: In an Age of Doing More with Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FLA. INT’L U. L. REV. 551, 557 (2010).

234. *Id.* at 557, 591.

235. *Id.* at 557.

fast-food campaigns incorporate much from the open source, network, and worker center visions. A better tag for the work, however, is improvisation. The rest of this Part shows how.

### C. *Improvisation as an Applied Technique of Renewal*

Improvisation, long the engine of jazz and the specialty of sketch comedy houses like Second City in Chicago and The Groundlings in Los Angeles, has rapidly spread to other disciplines in recent years, propelled by the idea that its tenets can improve all sorts of performances and methods.<sup>236</sup> The corporate world has developed a “fadlike” obsession with its potential,<sup>237</sup> and the Stanford, Duke, UCLA, and MIT business schools all teach it.<sup>238</sup> Although improvisation is a relatively new area of scholarship, researchers have identified its benefits in a variety of fields including both structured and unstructured settings, from education to firefighting to ocean navigation.<sup>239</sup>

Much of the recent research into improvisation takes place at the institutional level, where scholars see it not simply as skills training for certain employees,<sup>240</sup> but “a technique to enhance the strategic renewal of an organization” completely.<sup>241</sup> In practice, major U.S. firms have organized the development of entire product lines around the concept.<sup>242</sup>

Defining improvisation is not easy. Its content and scope are ongoing areas of inquiry and the list of published definitions is voluminous.<sup>243</sup> A recent attempt to distill the research defined organizational improvisation as “the conception of action as it unfolds,” with the entity and its supporters making snap decisions using “available material[s]” such as “cognitive, affective and

236. See Jason Zinoman, *Get the Laughs, but Follow the Rules*, N.Y. TIMES (Feb. 20, 2014), <http://www.nytimes.com/2014/02/23/arts/upright-citizens-brigade-writes-its-book-on-improv.html> [<https://perma.cc/VXG4-G4KF>] (“Is there anything improv can’t do?”).

237. Christine Moorman & Anne S. Miner, *Organizational Improvisation and Organizational Memory*, 23 ACAD. MGMT. REV. 698, 699 (1998).

238. Julia Flucht, *When the Art of the Deal Includes Improv Training*, NPR (Dec. 5, 2012), <http://www.npr.org/2012/12/05/166484466/it-s-improv-night-at-business-school> [<https://perma.cc/2KEE-S6P7>].

239. Ted Baker et al., *Improvising Firms: Bricolage, Account Giving and Improvisational Competencies in the Founding Process*, 32 RES. POL’Y 255, 255 (2003); Ken N. Kamoche et al., *Introduction and Overview to ORGANIZATIONAL IMPROVISATION 1* (Ken N. Kamoche et al., eds., 2002) (calling improvisation an “emergent discipline”).

240. Baker et al., *supra* note 239, at 270 (“Our finding of improvised foundings suggests improvisation can lie at the very core of firm strategies.”); Dusya Vera & Mary Crossan, *Improvisation and Innovative Performance in Teams*, 16 ORG. SCI. 203, 204 (2005) (“[A]lthough collective improvisation builds on individual improvisation, team improvisation is more than the sum of individual improvisations because the joint activities of individuals create a collective system of improvisational action.”).

241. Mary M. Crossan, *Improvisation in Action*, 9 ORG. SCI. 593, 593 (1998).

242. See, e.g., KIP KELLEY, UNC KENAN-FLAGLER BUS. SCH., *LEADERSHIP AGILITY: USING IMPROV TO BUILD CRITICAL SKILLS* 11 (2012) (noting that “Nike used improv to help managers design new shoes”).

243. See, e.g., Moorman & Miner, *supra* note 237, at 700–02 (charting various definitions).

social resources” in the moment.<sup>244</sup> Another way of expressing the notion, drawing more from music, focuses on rapidly transforming existing knowledge based on the facts at hand: “[R]eworking precomposed material . . . in relation to unanticipated ideas conceived, shaped, and transformed under the special conditions of performance.”<sup>245</sup> A less technical definition is also useful: when “performance and composition occur simultaneously—on the spot—through a practice that values surprise, innovation, and the vicissitudes of process rather than the fixed glory of a finished product.”<sup>246</sup>

But the best understanding of the idea in relation to Walmart and fast-food activism comes from consideration of three critical elements incorporated into the campaigns that exemplify improvisation by making use of its raw materials: strikes, reliance on autonomous mobilization, and cultivation of an experimental culture with minimal procedures and unsettled ends.

#### D. *Improvisation in the Walmart and Fast-Food Campaigns*

##### 1. *Strikes*

Improvisational performances owe their existence to a basic principle of interpersonal relations known in the literature as “yes-anding.”<sup>247</sup> Yes-anding is what gives improvisation its fluid, free-form quality, because adhering to the standard requires accepting whatever comes along (saying “yes”) and building on it (“anding”).<sup>248</sup> On stage this means taking hold of another’s idea, no matter how contextually bizarre or inappropriate, agreeing with it, and then enhancing it in some way.<sup>249</sup> The idea is to constantly “stretch” the conversation forward while not destroying what someone else has already brought to the interaction.<sup>250</sup> Yes-anding is so central to improvisation that its counter-principles, “no” and “yes, but,” are viewed as a “form of aggression.”<sup>251</sup>

Organizational theorists trumpet the role of yes-anding in team-based innovation, and much of improvisation’s application to group settings involves teaching everyone, from the CEO on down, to welcome, engage, and build up

244. Miguel Pina e Cunha et al., *Organizational Improvisation: What, When, How and Why*, in ORGANIZATIONAL IMPROVISATION, *supra* note 239, at 96, 99, 105.

245. Karl E. Weick, *Improvisation as a Mindset for Organizational Analysis*, 9 ORG. SCI. 543, 544 (1998).

246. DANIELLE GOLDMAN, I WANT TO BE READY: IMPROVISED DANCE AS A PRACTICE OF FREEDOM 5 (2010).

247. Crossan, *supra* note 241, at 596 (“Improvisers would say that the principle of ‘yes-anding’ is at the heart of improvisation.”).

248. *Id.* at 596–97.

249. Vera & Crossan, *supra* note 240, at 207.

250. *See id.* (“The rule of agreement creates a context in which improvisers are required to accept, support, and enhance the ideas expressed by other actors on stage without denying a player’s reality.”).

251. *Id.*

others' ideas.<sup>252</sup> A famous instance of yes-anding happened at 3M when a scientist said "yes" to an experimental adhesive that a colleague had set aside as too weak to be useful and then "and'ed" by using it to stick bits of paper to a book.<sup>253</sup> Noticing that the scraps could later be removed without damaging the pages, the scientist's snap move transformed the substance into the basis for a modern office marvel, the Post-It Note.<sup>254</sup>

At Walmart and in fast food, UFCW and SEIU have made strikes the indispensable engine of their work, and they have done so in ways that instantiate yes-anding. This has put improvisation at the campaigns' centers, a point that requires a sense of how the strikes are usually carried out to become clear. Seattle is a good example. There, fast-food activists and their supporters met at a park and progressed with drums from restaurant to restaurant, urging employees to stop work and join them.<sup>255</sup> Rebuffed by the only person working at Taco Del Mar, the group erupted at a nearby Subway when chants of "Walk out, we've got your back" prompted a sandwich-maker to flip off the lights and skip out the door.<sup>256</sup> The basic pattern repeated in St. Louis, where activists plopped down in booths before suddenly standing en masse, "stomping and clapping, chanting slogans and walking out the door" after imploring cashiers to join them.<sup>257</sup> In Chicago, "workers strode around the store encouraging coworkers to strike with them."<sup>258</sup> Things have gone a little differently at Walmart, which bars the media and OUR Walmart supporters from entering their stores prior to announced stoppages.<sup>259</sup> In response, OUR Walmart has set up elaborate displays outside the stores to encourage arriving workers and others inside to abandon their shifts.<sup>260</sup> On Black Friday 2012, they brought puppets and a "brass liberation band" to the edge of the company's property.<sup>261</sup>

The purpose of these walkout mechanics is to build a forced choice into strike days that, given the proximity of boisterous activists, generates a fraught intimacy that invites employees to yes-and: either the worker will say yes, stop what he or she is doing, and join the demonstration by "anding" in his or her own unique way, or the worker will not. In either case, the atmosphere created demands immediate response. This ultimatum for speedy action in a setting the

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252. *Id.*

253. *Id.* at 208.

254. *Id.*

255. Clarridge & Lacitis, *supra* note 164.

256. *Id.*

257. Sarah Kendzior, *The Minimum Wage Worker Strikes Back*, MEDIUM (Apr. 14, 2014), <https://medium.com/p/fa4c36eb306b> [<http://perma.cc/VA5K-UMEB>].

258. Micah Uetricht, *Fast Food Strikes Hit a Record 58 Cities, As Campaign's Tactics Are Debated*, THESE TIMES (Aug. 30, 2013, 11:30 AM), [http://inthesetimes.com/working/entry/15540/fast\\_food\\_strikes\\_in\\_record\\_58\\_cities](http://inthesetimes.com/working/entry/15540/fast_food_strikes_in_record_58_cities) [<https://perma.cc/TP6J-9JXD>].

259. Eidelson, *supra* note 8.

260. *Id.*

261. *Id.*

worker has not before encountered, and therefore has not fully planned for, makes a decision to strike—the choice to yes-and—improvisational.<sup>262</sup>

Indeed, it is the absence of intricate preplanning that distinguishes the Walmart and fast-food actions from conventional strikes and grounds them in improvisation.<sup>263</sup> For decades, labor has conducted strikes during contract negotiations, and planning for them has been elaborate.<sup>264</sup> Workers are informed about things that lie ahead—assigned picket line shifts, negotiating postures going forward, strike pay—and unions can anticipate the number of likely participants.<sup>265</sup> But at Walmart, McDonald's, and elsewhere, UFCW and SEIU take spasms of collective energy, throw it into the stores, and see what sticks.

The answer, usually, is not much. Most workers reject the yes-and opportunity and say “no,”<sup>266</sup> for good reasons: the boss is nearby, the threat of retaliation is real, and walking away in the middle of a shift is a strange and fear-inducing proposition.<sup>267</sup> It is more natural, certainly, for workers to fall

262. Cunha et al., *supra* note 244, at 111 (“[I]mprovisation arises when *both* (1) a demand for (a) speed and (b) action and (2) an unexpected (and unplanned for) occurrence are perceived . . .”).

263. Lack of structure and predesign relative to an organization's usual procedures are crucial hallmarks of improvisation. As a field study “underscored”:

[O]ne must pay careful attention to the level and temporal pace of regular organizational planning and innovation as part of a reliable method to assess the occurrence of improvisation. . . . [A] standard step in assessing improvisation should be to assess explicitly the level of organizational design or planning involved. One heuristic is to consider what level of formal planning would be relevant to the activity at hand and then contrast the action to that level of formal design.

Anne S. Miner et al., *Organizational Improvisation and Learning: A Field Study*, 46 ADMIN. SCI. Q. 304, 330–31 (2001).

264. Green, *supra* note 16, at 62 (describing strike preparations beginning “months earlier”).

265. A full year before a 1997 strike at UPS, the Teamsters organized worker rallies in thirty separate cities, sent 185,000 questionnaires to workers “asking what they wanted from the U.P.S. negotiations,” collected “100,000 signatures backing the union's demands,” and took a vote of the entire membership to measure support. Steven Greenhouse, *Yearlong Effort Key to Success for Teamsters*, N.Y. TIMES (Aug. 25, 1997), <http://www.nytimes.com/1997/08/25/us/yearlong-effort-key-to-success-for-teamsters.html> [<http://perma.cc/9BTE-2X38>]. A strike at Hormel involved similar preparations plus committees to manage practical needs like food stockpiles and clothing donations. See GREEN, *supra* note 16, at 62, 75–76.

266. At Walmart, “[l]abor historian Nelson Lichtenstein suggested that calling a walkout by some hundred workers out of a workforce of 1.4 million a strike was ‘a little bit of a devaluation of the word.’” Eidelson, *supra* note 120. At fast-food restaurants, “[m]ost greeted [activists’ entreaties] warmly but demurred.” Kendzior, *supra* note 257.

267. Fear is a frequently cited reason for not striking. A New York City fast-food activist reported that prior to the first strike only three of his forty coworkers signed a petition in support of the campaign because “[t]hey don’t want to lose their job.” Eidelson, *supra* note 11; see also Kendzior, *supra* note 257 (quoting a fast-food activist statement that “a lot of people are scared because of pressure . . . If you do this, you get fired”). By August 2013 OUR Walmart had estimated that sixty strikers had been disciplined and twenty-four had been fired in the wake of the campaign. Jenny Brown, *Retaliation Is Illegal, But Walmart Doesn’t Care*, LAB. NOTES (Aug. 20, 2013), <http://www.labornotes.org/2013/08/retaliation-illegal-walmart-doesn%E2%80%99t-care> [<https://perma.cc/6K2W-AQ9R>].

back on antiunion scripts pressed upon them by management at the start of employment and reupped in the lead-up to strikes.<sup>268</sup>

The task for the campaigns, then, is to get workers to reject the more comfortable and well-worn path, accept the yes-and invitation, and improvise.<sup>269</sup> The challenge is crystalized by two well-known incidents in organizational studies where firefighters perished trying to outrun forest fires after ignoring orders to drop heavy tools that would have, as a commission later concluded, “significantly increased the . . . chance of escape.”<sup>270</sup> Improvisation scholars attribute the failure to values “overlearned” in training and practice, principally the maxim that firefighters must never separate from their equipment during fires.<sup>271</sup> Even in the face of direct orders to the contrary, immediate stress caused the firefighters to “regress to what they kn[e]w best . . . keeping their tools.”<sup>272</sup> Overcoming that embedded reflex required a willingness to improvise.<sup>273</sup>

Fostering that willingness against a backdrop of tension and a more comfortable fallback involves, among other things, trust and good reasons.<sup>274</sup> The firefighters did not know the people shouting the orders well, and no justification was given for dropping the tools.<sup>275</sup> The campaigns, however, try to build confidence and an understanding that striking is meaningful by continually pointing to earlier actions that built power and even won small concessions. Strikers tout tales of workers who struck and returned to better

268. The fast-food industry’s trade-group organizes much of this work, including employee monitoring on strike days. Josh Eidelson, *Exclusive: Private Documents Reveal How Big Restaurant Lobby Monitors Fast Food Protests*, SALON (May 5, 2014, 5:30 AM), [http://www.salon.com/2014/05/05/exclusive\\_private\\_e-mails\\_reveal\\_how\\_big\\_restaurant\\_lobby\\_monitors\\_fast\\_food\\_protests](http://www.salon.com/2014/05/05/exclusive_private_e-mails_reveal_how_big_restaurant_lobby_monitors_fast_food_protests) [https://perma.cc/6LE5-WGSU]. Walmart, in addition, has long woven antiunion persuasion into its working conditions. Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462, 1463 (2008) (tracing the “historical origins of Wal-Mart antiunionism”).

269. Cunha et al., *supra* note 244, at 117–18 (describing the difficulty of fostering improvisation where “adequate routine[s]” exist and noting that “improvisation appears to only occur when an organization/individual does not have an adequate routine/procedural memory to respond to an unexpected situation”).

270. Karl E. Weick, *Drop Your Tools: An Allegory for Organizational Studies*, 41 ADMIN. SCI. Q. 301, 304–05 (1996).

271. *Id.* at 306.

272. *Id.* at 306–07.

273. Karl E. Weick, *The Collapse of Sensemaking in Organizations: The Mann Gulch Disaster*, 38 ADMIN. SCI. Q. 628, 640 (1993) (“Swift replacement of a traditional order with an improvised order would forestall the paralysis that can follow a command to ‘drop your tools.’”).

274. Weick, *supra* note 270, at 305–06; *see also* Vera & Crossan, *supra* note 240, at 206, 221 (describing the importance of trust in “quality improvisation” and “improvisational dynamics”); Mary Crossan & Marc Sorrenti, *Making Sense of Improvisation*, in *ADVANCES IN STRATEGIC MANAGEMENT* 155, 174 (James P. Walsh & Paul Shrivastava eds., 1997) (“Without an awareness of the need for improvisation, or an understanding of what it entails, there will be little motivation to engage it.”).

275. Crossan & Sorrenti, *supra* note 274, at 164.

hours or slight raises and those stories become campaign lore.<sup>276</sup> Walmart's downgrading by an equities research firm as a result of costs associated with "assuaging labor groups"<sup>277</sup> and a McDonald's Securities and Exchange Commission filing citing "labor strikes" as a factor that "can adversely affect us" also make the rounds.<sup>278</sup> And workers speak openly of drawing "inspiration" from previous walkouts and gaining "faith" in the campaign as more and more workers jump on board.<sup>279</sup> A Chicago retail employee who was at first hesitant to walk out "because of the risk of retaliation" is representative: "[W]hat we are fighting for, the reason for doing it, kind of overrode the fear of doing it."<sup>280</sup>

A perhaps surprising insight that emerges from this process is that improvisation can be a "conscious choice."<sup>281</sup> When the cast of *Second City* prepares to take the stage at 9:00 p.m. on a Thursday, they have made a "plan to improvise."<sup>282</sup> Likewise, many Walmart workers, who had weeks of media- and organizer-generated notice before the Black Friday events, might have decided to accept the invitation to "yes-and" and strike days in advance.

Similarly, improvisation is not "random behavior."<sup>283</sup> Strong improvisational skills can be developed and practiced to "help improvisers . . . focus on the process of creation without becoming overwhelmed by the pressure of extemporaneous performance,"<sup>284</sup> a phenomenon one researcher has termed "[r]ehearsed [s]pontaneity."<sup>285</sup> An accomplished jazz artist works within a basic framework of embedded skills as well as within a certain scale

276. See, e.g., Kari Lydersen, *In Streets of Chicago, Fast Food Workers Celebrate Small Victories*, *THESE TIMES* (Aug. 1, 2013), [http://inthesetimes.com/article/print/15394/retail\\_and\\_fast\\_food\\_workers\\_celebrate\\_organizing\\_victories](http://inthesetimes.com/article/print/15394/retail_and_fast_food_workers_celebrate_organizing_victories) [<https://perma.cc/6FPH-TYE9>] (citing specific examples of workers reporting that "they had gotten raises, better schedules, more hours and better working conditions since the April 24 strike"); Saki Knafo, *Seattle's Fast-Food Workers Strike as National Movement Begins to Claim Small Victories*, *HUFFINGTON POST* (May 30, 2013), [http://www.huffingtonpost.com/2013/05/30/seattle-fast-food-workers-strike\\_n\\_3361608.html](http://www.huffingtonpost.com/2013/05/30/seattle-fast-food-workers-strike_n_3361608.html) [<http://perma.cc/BJG9-Z96V>] ("Conditions, hours, positions and pay have improved for a number of workers who participated in strikes in the last two months. . .").

277. Bryce Covert, *Walmart's Labor Practices Backfire*, *THINKPROGRESS* (Feb. 10, 2014, 11:34 AM), <http://thinkprogress.org/economy/2014/02/10/3271221/walmart-downgraded-understaffing> [<http://perma.cc/EH4F-L8M2>].

278. Josh Eidelson, *McDonald's to SEC: Strikes Hurt, and We Might Have to Hike Pay*, *SALON* (Mar. 4, 2014, 2:11 PM), [http://www.salon.com/2014/03/04/mcdonalds\\_to\\_sec\\_strikes\\_hurt\\_and\\_we\\_might\\_have\\_hike\\_pay](http://www.salon.com/2014/03/04/mcdonalds_to_sec_strikes_hurt_and_we_might_have_hike_pay) [<http://perma.cc/ETS4-K9F9>].

279. Eidelson, *supra* note 11.

280. Josh Eidelson, *Fast Food Walkout Planned in Chicago*, *SALON* (Apr. 23, 2013, 6:45 PM), [http://www.salon.com/2013/04/24/fast\\_food\\_walkout\\_planned\\_in\\_chicago](http://www.salon.com/2013/04/24/fast_food_walkout_planned_in_chicago) [<https://perma.cc/DC2Z-37HA>].

281. Vera & Crossan, *supra* note 240, at 205.

282. *Id.* at 206; see also *id.* at 205 ("The decision to improvise may be made on the spot or may be an option considered in advance, as when firms have . . . norms enabling people to depart from routines at certain times. . .").

283. *Id.* at 205.

284. *Id.* at 206.

285. Philip H. Mirvis, *Practice Improvisation*, 9 *ORG. SCI.* 586, 587 (1998).

pattern to create harmonies on stage.<sup>286</sup> The musician may then draw upon rehearsal experience to have a sense of when to, for instance, allude back to a certain theme, even as each note is nevertheless selected in the moment.<sup>287</sup> Stephen Curry, to take another example, practices jump shots incessantly, but when, where, and how he shoots in a game is determined by split-second decision making tied to how plays develop live.<sup>288</sup>

The campaigns, likewise, try to meet with workers in advance to discuss when a strike could happen, to provide practical tips to maximize legal protection during the strike, and to warn about the ways management might respond.<sup>289</sup> If a worker eventually accepts the improv challenge and says “yes” to stopping work, real-time data replaces that conditional information to shape the “and”—only instead of a club or a court, the setting is the workplace, and instead of musicians, athletes, and fans, the extras are coworkers, supervisors, and customers.<sup>290</sup> Daniel Fischlin and his colleagues nicely identify the broad interests at play:

What is at stake, both in the moment of improvisation and in the moment when a rights outcome is to be decided through one’s own agency, is fundamentally provisional, uncertain, and contingent. The substance of what one decides in that moment becomes the material content of the improvisation, the enactment of agency that has social-justice implications.<sup>291</sup>

#### *a. Improvisation’s Promise*

But if few people actually stop work, why even bother? Because with improvisation, there is reason to believe that the activity can spread.

Separate from any negotiating leverage gained by withholding labor, strikes have long been thought to carry symbolic power that draws people in.<sup>292</sup>

286. Alistair Preston, *Improvising Order*, in ORGANIZATION ANALYSIS AND DEVELOPMENT 81, 85 (Iain L. Mangham ed., 1987).

287. STEPHEN NACHMANOVITCH, FREE PLAY: IMPROVISATION IN LIFE AND ART 32 (1990); see also GOLDMAN, *supra* note 246, at 5–6 (“As the musician Arthur Rhames explains, ‘Improvisation is an intuitive process for me now, but . . . I’m calling upon all the resources of all the years of my playing at once: my academic understanding of the music, my historical understanding of the music, and my technical understanding of the instrument I’m playing.’”).

288. David Fleming, *Stephen Curry: The Full Circle*, ESPN MAG. (Apr. 23, 2015), [http://espn.go.com/espn/feature/story/\\_/id/12728744/how-golden-state-warriors-stephen-curry-became-nba-best-point-guard](http://espn.go.com/espn/feature/story/_/id/12728744/how-golden-state-warriors-stephen-curry-became-nba-best-point-guard) [<https://perma.cc/3XXQ-XV95>] (“Stephen, who loves his craft so much that he often takes 1,000 shots *before* practice. . . .”); see also Mirvis, *supra* note 285, at 587 (describing Dennis Rodman’s practice regime).

289. Prestrike union meetings have been described in a number of articles. See, e.g., Eidelson, *supra* note 11; Uetricht, *supra* note 26.

290. See Vera & Crossan, *supra* note 240, at 208 (describing how “[r]eal-time information and [c]ommunication” impacts improvisatory actions); Miner et al., *supra* note 263, at 316 (“The impact of real-time experience on action is the defining characteristic of improvisation.”).

291. FISCHLIN ET AL., *supra* note 30, at 88.

292. LAMBERT, *supra* note 14, at 23.

Uniforms worn and songs sung during demonstrations highlight work's humanity.<sup>293</sup> Interests articulated loudly, with courage, can construct solidarities.<sup>294</sup>

Adding improvisation to the mix may magnify and scatter this effect. For one, those involved in the campaign's strikes believe this to be true, expressing desires to "set an example for the rest of the people in fast food"<sup>295</sup> and believing that "if I stand up . . . a change can happen."<sup>296</sup> Commentators have also identified a "contagious" quality to the campaigns.<sup>297</sup>

Some of this goes to the nature of improvisational acts, which stoke strong emotions. Jazz's power to "open[] channels of . . . aesthetic communication and experience" between musicians relates this well,<sup>298</sup> as does the "incredible rush of energy, coherence and clarity" and even "transcendence" many describe while improvising.<sup>299</sup> Fast food and Walmart activists in fact use powerfully emotive language to recount their interactions with other strikers. "It took my breath away," explained an Oakland, California, KFC employee.<sup>300</sup> Walmart striker Dominic Ware portrayed walking out in terms that evoke euphoria: "It's amazing, it's really amazing . . . [I]t just touched me in so many ways that I really haven't taken it all in . . . It's just beautiful, man. We're winning. No matter what Walmart says, we're winning."<sup>301</sup>

Scholars attribute such reactions to improvisation's power to help people "critical[ly] engage[]" and, for a limited period, break free from "social and historical positions" of constraint.<sup>302</sup> Steven Nachmanovitch has described it as a way to bridge "the gap between what we feel and what we can express," allowing us to "give up being safely wrapped in our own stor[ies]."<sup>303</sup> For Walmart and fast-food workers, strike improvisation thus seemingly comes down to agency—the chance to work a job and have a boss, but also to bend the narrative from time to time and articulate dignity. This duality is exemplified by Patrick, a 24-year-old Chipotle employee who is "charming behind the register," "quick on the floor," and maintains a "cautious and

293. *Id.*

294. *Id.*

295. Eidelson, *supra* note 160.

296. Eidelson, *supra* note 280.

297. Ned Resnikoff, *Hundreds of Service Workers Strike in Chicago*, NBC NEWS (Apr. 24, 2013, 8:17 AM), <http://www.nbcnews.com/id/51643388/t/hundreds-service-workers-strike-chicago/#.U6xWwfldV8E> [<https://perma.cc/LL2X-AEES>].

298. Mary Jo Hatch, *Jazz as a Metaphor for Organizing*, 9 ORG. SCI. 565, 568 (1998).

299. NACHMANOVITCH, *supra* note 287, at 18; Cunha et al., *supra* note 244, at 127.

300. Abramsky, *supra* note 179.

301. Eidelson, *supra* note 8; see also Micah Uetricht, *Low Wage Workers Strike—Because YOLO*, DISSENT MAG. (Apr. 26, 2013), [https://www.dissentmagazine.org/online\\_articles/low-wage-workers-strike-because-yolo](https://www.dissentmagazine.org/online_articles/low-wage-workers-strike-because-yolo) [<https://perma.cc/7D8Z-T9H7>] ("And withdraw their labor they did, joyously and unapologetically.")

302. GOLDMAN, *supra* note 246, at 5.

303. NACHMANOVITCH, *supra* note 287, at 21, 67.

conscientious” demeanor as he rings up orders.<sup>304</sup> In May 2013 Patrick jumped the counter, crashed an assembly shouting, “We can’t survive on \$7.35,” grabbed a microphone, and spoke—for the first time ever before a crowd—about the stress of not having enough money to pay his bills.<sup>305</sup> And the next day he went back to work.

The upshot of it all, research suggests, is that improvisational acts like Patrick’s motivate more improvisational acts.<sup>306</sup> This is true in the sense that workers who have struck once are driven to do so again.<sup>307</sup> It can also be seen in the steady expansion of Walmart and restaurant strikes and especially the interplay between them: the April 2013 fast-food strikers reported being inspired by their November 2012 counterparts, who had cited the example set by the first wave of Walmart strikers, and those strikers, in turn, gave credit to their warehouse compatriots who had walked out a few weeks earlier.<sup>308</sup> Concrete examples include Burger King worker Tabitha Verges, who described being “kind of upset” to have only watched workers at other franchises walk out during the first New York City strike in 2012. When she “heard there was another one,” she was “all for it.”<sup>309</sup> In Detroit, similarly, eight McDonald’s employees who told organizers they would not strike reversed course suddenly “after watching four of their [coworkers] walk off the job.”<sup>310</sup>

The campaigns, however, are careful not to limit their invitations for improvisation solely to the relatively small number of workers they are able to connect with in person. UFCW and SEIU also court improvisational acts by people who may have never been in touch with a paid organizer. This reliance on autonomous mobilization is a second key plank of the Walmart and fast-food campaigns, and it too is rooted in improvisation.

## 2. *Autonomous Mobilization*

Although a good deal of organizational science’s research into improvisation concerns intentional action, improvisation can arise naturally in

304. Kendzior, *supra* note 257.

305. *Id.*

306. Cunha et al., *supra* note 244, at 127 (“Improvisation in organizations also results in increasing motivation (1) to work and (2) to improvise.”).

307. Whole Foods employee Trish Kahle described this scene after an April strike:

[C]ampaign organizers in Chicago asked if any workers wanted to get on a bus and drive five hours to St. Louis or Milwaukee to support workers striking the next week.

Hands shot up. A few people lamented that they were scheduled to work that day. In the front of the room, a middle-aged African-American McDonald’s worker stood up. “Let’s go on strike again,” he said. “Then we all can go.”

Kahle, *supra* note 157; *see also* Uetrict, *supra* note 301 (“Now a bit more comfortable with the tactic, those workers will likely be more willing to engage in strikes with all of their coworkers . . .”).

308. Eidelson, *supra* note 155.

309. *All in with Chris Hayes*, MSNBC (Apr. 5, 2013, 12:36 PM), [http://www.nbcnews.com/id/51442243/ns/msnbc-all\\_in\\_with\\_chris\\_hayes/t/all-chris-hayes-thursday-april-th/#.U6ymufldV8E](http://www.nbcnews.com/id/51442243/ns/msnbc-all_in_with_chris_hayes/t/all-chris-hayes-thursday-april-th/#.U6ymufldV8E) [<http://perma.cc/47NT-AYUF>].

310. Eidelson, *supra* note 163.

all sorts of unstructured settings. That is, improvisation can be “a product of adaptation rather than of design.”<sup>311</sup> Something as pedestrian as small talk, after all, can be thought of as a series of statements that adapt to and build upon earlier statements in an unplanned way.<sup>312</sup> Improvisation also works in mediation, trial lawyering, and schools, where lawyers and teachers readjust and acclimate to situations on the fly.<sup>313</sup>

UFCW and SEIU try to take advantage of improvisation’s potentially organic nature by developing avenues for workers and the public to come in contact with the campaigns’ issues and face time-sensitive chances to yes-and on their own. A prime example is the Internet-based strike kit, which provides workers with the motivation and means to stage sudden walkouts even if a campaign staffer is nowhere to be found. The fast-food version comes with a hotline to speak with workers who have previously struck, along with a sample letter to management explaining that “[w]e are sick of making poverty wages and living on food stamps, in shelters, [and] on family’s couches.”<sup>314</sup> Among the kit’s fifteen steps include advice to “[m]ake signs that say why you are on strike,” to “[s]tart your strike” by gathering “outside your store with your supporters,” to “[c]all the local TV station,” and then to “[g]o back to work at your next regularly scheduled shift with your head held high.”<sup>315</sup> The final step gestures toward future actions and future strikers: “Tell your coworkers how it felt to stand up for \$15 an hour and the right to form a union.”<sup>316</sup>

The kit played a starring role in the 2012 Black Friday actions, where a sizable portion of participants involved in the fifteen hundred protests responded to OUR Walmart’s purely virtual invitations to strike, guided by the kit instead of a roving band of in-person activists.<sup>317</sup> More frequently, the kits offer workers the power to improvise strikes in response to independent triggering events like workplace insults, which individuals might otherwise accept at face value. In Chicago, workers notified the union only after they had walked off the job and “padlock[ed]” the door to protest an overheated kitchen.<sup>318</sup> Christopher Owen, a Walmart employee in Oklahoma, who had

311. Edwin Hutchins, *Organizing Work by Adaptation*, 2 *ORG. SCI.* 14, 14 (1991); see also Baker et al., *supra* note 239, at 255 (categorizing “extemporaneous” adaptation as “improvisation”).

312. John W. Cooley, *Mediation, Improvisation, and All That Jazz*, 2007 *J. DISP. RESOL.* 325, 328 (2007).

313. *Id.* at 343–84; see also Steven Lubet & Thomas Hankinson, *In Facetis Veritas: How Improvisational Comedy Can Help Trial Lawyers Get Some Chops*, 7 *TEX. REV. ENT. & SPORTS L.* 1, 8–13 (2006); David M. Irby, *How Attending Physicians Make Instructional Decisions When Conducting Teaching Rounds*, 67 *ACAD. MED.* 630, 630–38 (1992).

314. *Low Pay Is Not Ok*, FIGHT FOR \$15, [http://fightfor15.org/wordpress/wp-content/uploads/2013/08/lpnok\\_strike\\_letter.pdf](http://fightfor15.org/wordpress/wp-content/uploads/2013/08/lpnok_strike_letter.pdf) [<https://perma.cc/QB95-YVR9>] (last visited Mar. 5, 2016).

315. *For Workers*, FIGHT FOR \$15, <http://fightfor15.org/for-workers> [<https://perma.cc/3Q2N-493A>] (last visited Mar. 4, 2016).

316. *Id.*

317. Jaffe, *supra* note 9.

318. Uetric, *supra* note 26.

never even met an OUR Walmart organizer or member, googled the group after becoming upset by an antiunion staff meeting's tone.<sup>319</sup> Owen skimmed the strike-in-a-box, phoned his manager, and announced that he was going on strike and setting up a personal picket during his next shift.<sup>320</sup>

Autonomous mobilization is not limited to workers. The public, too, is encouraged to improvise when the campaigns intentionally thrust them into situations necessitating adaptation to an unexpected scene. Most basically, the Walmart and fast-food strikes are conspicuous, celebratory events accompanied by marches that spur random bystanders to take notice, honk in support, or even join in the fun, swelling crowds as workers, musicians, allies, and politicians speak out on makeshift stages.<sup>321</sup>

More to the point, an underreported aspect of the fast-food strikes is the use of “walk-backs,” where community members—usually led by local clergy or politicians—escort workers back to the job after a walkout concludes.<sup>322</sup> Once in the restaurant the activists warn the employer not to retaliate against the striker. This has two effects. One, it forces community supporters to personally confront and adjust to management in the moment. When a Brooklyn Wendy's fired a striker during a walk-back, the councilman leading the group, who was “shocked” by the turn of events, improvised by leading supporters in a circular march around the restaurant until police arrived, at which point the strikers “began a vigorous picket on the sidewalk.”<sup>323</sup> In St. Louis, Arby's strikers, who returned to find their hours cut, got backup from two rabbis who demanded a meeting with the ownership and threatened to flood the store with two thousand congregants unless the schedules were

319. Eidelson, *supra* note 8.

320. *Id.* Owen ultimately “decided against” the picket after learning that thirty-nine police officers had been hired to patrol the property. *Id.* Fight for \$15's April 15, 2015 action saw almost fifty security guards and drivers otherwise unconnected to the campaign “suddenly . . . walk off the job.” Arielle Zions & Micah Uetrict, *During Yesterday's Fight for 15 Protests, Nearly 50 Chicago Armored Guards Decided to Go on Strike*, THESE TIMES (Apr. 16, 2015, 1:22 PM), [http://inthesetimes.com/working/entry/17852/brinks\\_strike\\_fight\\_for\\_15](http://inthesetimes.com/working/entry/17852/brinks_strike_fight_for_15) [<https://perma.cc/5C42-8RXV>].

321. Claridge & Lacitis, *supra* note 164 (noting “honking and waving from passers-by”); *see also* Greenhouse, *supra* note 10 (describing strikes “culminat[ing] in a rally with hundreds of fast-food workers” near Times Square); Eidelson, *supra* note 160 (describing strikers, supporters, and politicians gathering in park and marching to a rally in front of a Harlem McDonald's); FISCHLIN ET AL., *supra* note 30, at 154 (describing improvisational aspects of audience participation in parades and rallies).

322. Finnegan, *supra* note 153; Zions & Uetrict, *supra* note 320 (“At 5:00 a.m. this morning, a group of about 20 Fight for 15 staffers and community supporters accompanied a group of around two dozen workers back to work, a tactic which the movement has used after every strike.”); Low Pay Is Not OK (@LowPayIsNotOK), TWITTER (Sept. 7, 2014, 9:18 PM), <https://twitter.com/lowpayisnotok/status/508831662546120704> [<https://perma.cc/8AZV-KELG>] (“Every f[ast] f[ood] worker who goes on strike is walked back for their first shift by 100's of volunteers across the country.”). The strike kit, moreover, urges workers to “[a]sk supporters to come with you when you and your coworkers return to work.” *For Workers*, *supra* note 315.

323. Josh Eidelson, *Fast-Food Striker Fired—But Not for Long*, SALON (Dec. 1, 2012, 6:47 AM), [http://www.salon.com/2012/12/01/fast\\_food\\_striker\\_fired\\_but\\_not\\_for\\_long](http://www.salon.com/2012/12/01/fast_food_striker_fired_but_not_for_long) [<https://perma.cc/ZA2M-YQ67>].

restored.<sup>324</sup> Two, because the walk-backs occur when the restaurants are open for business, the technique pushes unsuspecting customers into the fray. At the Brooklyn Wendy's, for instance, the walk-back group urged the patrons to "leave in support of the worker that was fired."<sup>325</sup> Everyone did.

Thus, by stirring dispersed workers to strike on their own and by pushing the public to adapt to workplace dramas that they otherwise would not encounter, the campaigns utilize improvisation to outsource activism to participants who organizers may not know and certainly cannot control. This method itself signals an internal shift in union culture, which is the third major improvisational characteristic of the campaigns. The revised culture has three components: procedural openness, embrace of process over settled ends, and experimentalism.

### 3. *Improvisational Internal Culture*

A major focus of improvisation scholarship concerns the types of organizational cultures that incubate it. Detailed protocols and complex blueprints, apparently, do not.<sup>326</sup> This would come as no surprise to jazz musicians, who compulsively guard against predictability. Miles Davis, to cite one case, was known to surprise his band by starting a song in an unrehearsed key to conjure up the right "disrupti[ve]" spirit.<sup>327</sup>

Standardized procedures, however, have long been a part of the union-organizing playbook, no matter the campaign. This includes intensive organizer training, manuals to help cultivate worker-activists, and an arsenal of long-practiced tactics like surveys, committees, and numeric grids to track employee sentiment.<sup>328</sup>

The Walmart and fast-food campaigns have traded this emphasis on procedure, structure, and control for a fealty to improvisation that, as research counsels, requires flexibility and adaptability.<sup>329</sup> Instead of guidebooks, ratings, and surveys, they have shouts, sign-ins, and a website. Instead of trying to

324. Laura Shin, *Why This Minister Is Joining Fast Food Workers in Their Fight for Higher Wages*, FORBES (May 18, 2014, 8:50 AM), <http://www.forbes.com/sites/laurashin/2014/05/18/why-this-minister-is-joining-fast-food-workers-in-their-fight-for-higher-wages/#49c71f912ec4> [<https://perma.cc/MMC2-MFDF>].

325. Eidelson, *supra* note 323.

326. Preston, *supra* note 286, at 98–101.

327. Frank J. Barrett, *Creativity and Improvisation in Jazz and Organizations: Implications for Organizational Learning*, 9 ORG. SCI. 605, 609 (1998).

328. *Organizing Institute*, AFL-CIO, <http://www.aflcio.org/Get-Involved/Become-a-Union-Organizer/Organizing-Institute> [<https://perma.cc/MA7Q-8ABC>] (last visited Sept. 21, 2015) (describing the AFL-CIO's organizing training institute); see also Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L.L. REV. 313, 348–49 (2012); Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in ORGANIZING TO WIN 19, 23–24 (Kate Bronfenbrenner et al. eds., 1998) (listing and analyzing tactics); Patel, *supra* note 2.

329. Barrett, *supra* note 327, at 611–12.

regulate the activist environment, the campaigns just act and then wait to see who streams out the door.<sup>330</sup>

The procedural shift relates partly to a novel emphasis on process, not outcomes, another style thought to be improv-enriching and, in a business context, to promote innovation.<sup>331</sup> Xerox PARC, the small, storied 1970s research arm of Xerox, famously had no “directives, instructions, or deadlines” and achieved legendary status as the breeding ground for an astonishing number of modern technologies.<sup>332</sup> Its purpose, simply, was an indefinite quest to push Xerox somewhere completely new.<sup>333</sup> Today, companies like Google boast policies that let techies spend portions of their time on no-strings-attached “passion project[s].”<sup>334</sup> The now ubiquitous Gmail messaging system, in fact, was once a half-baked idea that came to fruition through officially unstructured programming.<sup>335</sup>

UFCW and SEIU too have prioritized process over ends, proceeding at Walmart and in fast food with undefined and aspirational goals, respectively. Freed from the strictures of a timeline, their airy objectives feel not so far removed from Xerox PARC’s. But instead of sending a “bunch of smart people” into a room to think, the unions make way for activism to spin out into the wild just to see what happens.<sup>336</sup> As one worker put it, the lack of top-down mission enforcement opens space for “possibilities far beyond what organizers” ever “imagined.”<sup>337</sup>

To be sure, when viewed from afar, the full panoply of tactics used at Walmart and in fast food give the overall efforts an experimentalist feel.<sup>338</sup> For

330. Cf. Crossan, *supra* note 241, at 595 (“A principle of improvisation is that the environment will teach you if you let it, rather than trying to control it.”).

331. Vera & Crossan, *supra* note 240, at 205 (defining improv by its focus “on the creative process and not on the creative outcome”); see also GOLDMAN, *supra* note 246, at 5 (discussing improvisation as a “practice that values . . . the vicissitudes of process rather than the fixed glory of a finished product”).

332. MICHAEL HILTZIK, *DEALERS OF LIGHTNING* xxvi (1999). The Internet, web browser, ATM, modern cartoon, mouse, and laser printer are all linked to Xerox PARC’s lab. *Id.* at xxiv-xxv; see also *id.* at xxviii (calling Xerox PARC “one of the most productive and inventive research centers ever known”).

333. *Id.* at xxvi.

334. Ryan Tate, *Google Couldn’t Kill 20 Percent Time Even if It Wanted to*, WIRE (Aug. 21, 2013, 6:30 AM), <http://www.wired.com/2013/08/20-percent-time-will-never-die> [<https://perma.cc/VN9M-SGGQ>].

335. *Id.*

336. See Malcolm Gladwell, *Creation Myth*, NEW YORKER (May 16, 2011), <http://www.newyorker.com/magazine/2011/05/16/creation-myth> [<https://perma.cc/U5GZ-3T3U>] (quoting a Microsoft executive who tried to follow Xerox PARC’s example: “When you have a bunch of smart people with a broad enough charter, you will always get something good out of it”).

337. Kahle, *supra* note 157.

338. As President Trumka stated openly in describing the new approaches: “Some will work; some won’t, but we’ll be opening up the labor movement.” Harold Meyerson, *Opinion, Labor Wrestles with Its Future*, WASH. POST (May 8, 2013), [https://www.washingtonpost.com/opinions/harold-meyerson-labor-wrestles-with-its-future/2013/05/08/852192d6-b74f-11e2-b94c-b684dda07add\\_story.html](https://www.washingtonpost.com/opinions/harold-meyerson-labor-wrestles-with-its-future/2013/05/08/852192d6-b74f-11e2-b94c-b684dda07add_story.html) [<https://perma.cc/N6BJ-EJZF>].

all the commotion whipped up by strikes, any one of the other campaign gambits could end up being the lever that leads to substantial workplace gains or power. A nationwide agreement easing the path to unionization or raising wages at Pizza Hut or McDonald's franchises might come not from more domestic walkouts but from global pressure brought to bear on Yum Brands! or McDonald's Corporation by international groups and unions. Black Friday rallies could continue to generate press, but grievous kinks in Walmart's supply chain sparked by warehouse allies could be the crisis that forces the company to finally crack. And the path to \$15 an hour in fast food might be a critical mass of lawsuits or city council actions, not walk-backs.

This sort of experimentalism—what might even be called a “kitchen sink” approach—reflects the very heart of improvisational culture.<sup>339</sup> Although some have criticized what's essentially organizational “ad-libbing,”<sup>340</sup> improvisation theorists have found value in “explorat[ory] attempts” that fail and, frankly, may not have had much chance in the first place.<sup>341</sup> That is not just because of the obvious point that important lessons can be bound up in mistakes, but when organizations teach members that it is okay to take risks, and that gutsy but failing efforts will not be punished, people are emboldened instead of immobilized—and improvisation thrives.<sup>342</sup> Nurturing what has been called an “aesthetic of imperfection” amid an “aesthetic of forgiveness” may be an institution's best chance to hit upon the winning formula.<sup>343</sup>

#### IV.

##### IMPROVISATIONAL UNIONISM AS A LABOR LAW STRATEGY

So far, the story of improvisational unionism has focused on improvisation as a social practice, an interpersonal tool that can form, rearrange, and even mobilize relationships in service to some, possibly unknown, type of change.<sup>344</sup> But another tale needs telling. The improvisational turn has a legal story as well.

Labor law professors have long looked at labor doctrine with somewhat of a sideways glare. Much of modern scholarship can be categorized as laments animated by the ways the law cabins conduct, polices possibilities, and defines defaults.<sup>345</sup> In the classroom, students quickly realize that the law is crucially

339. Vera & Crossan, *supra* note 240, at 208.

340. Steven Greenhouse, *A Day's Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES (July 31, 2013), <http://www.nytimes.com/2013/08/01/business/strike-for-day-seeks-to-raise-fast-food-pay.html> [<https://perma.cc/RG5T-H4RX>].

341. Barrett, *supra* note 327, at 610–11, 619.

342. *Id.*

343. *Id.* at 619.

344. See FISCHLIN ET AL., *supra* note 30, at xxiii (discussing improvisation as a “social practice” and “model for social change”).

345. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570–71 (2007).

important to labor-management relations, but mostly in ways that depress people who care about unions.

Labor law is important to improvisational unionism, too. But the question of *why* improvisation has been given a shot at center stage goes less to the conventional complaints about the law's harsh impact and more to *how* the law evolved from a regime of possibility to a regime of constraint. In short, and as explained below, improvisation may be a way out from under these legal developments.

*A. The Burden of Legal Evolution, the Weight of Institutional Maturity*

Though it is difficult to imagine today, long before labor confronted the current crisis of a progressively dwindling membership, it faced the opposite problem: harnessing the explosive spirits of a workforce clamoring for a voice on the job. In 1934 alone, one-and-a-half million workers struck using tactics that historians have variously described as “unpredictable,”<sup>346</sup> “creativ[e],”<sup>347</sup> and “uncommonly militant.”<sup>348</sup> Though this era remains a magical reference point, a time when shop and street activism “swept up workers in every geographical area and in every trade and industry” and transformed so many into members that some unions simply ran out of “dues books,” it was also marked by nothing short of open warfare, including destruction, injuries, and deaths.<sup>349</sup> For these reasons, the period also served as a catalyst for legislative change, which came in the form of the NLRA, then known as the Wagner Act.<sup>350</sup> The new statute brought order to the system by federalizing a right to collectively bargain and setting up administrative procedures to get there, and, in most accounts, the key union-side parties felt basically sunny about the new regime's potential.<sup>351</sup>

But clouds rolled in. In remarkably short time, Supreme Court decisions began to define the scope of “‘legitimate’ labor activity” while tamping formerly unregulated shop floor fights into tidy “domesticated channels.”<sup>352</sup>

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346. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 121 (1977).

347. JEREMY BRECHER, *STRIKE!* 216 (1997).

348. ROBERT H. ZIEGER, *AMERICAN WORKERS, AMERICAN UNIONS* 27 (1986).

349. *Id.* at 27, 31, 33–35.

350. *Id.*

351. In Klare's telling, the left applauded the law's “radical potential,” something reflected in the reactions of a terrified business class; union officials thought the law “embodied the[ir] highest aspirations,” though those were modest, extending not much further than the right to prosper inside capitalism's existing shell. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *MINN. L. REV.* 265, 287–90 (1978). And although workers, many of whom had recently risked life and limb fighting for economic revolution, saw the law as at best a half-measure, “it nevertheless symbolized a significant opening” in the right direction. *Id.* Klare's account of this period is not without its critics, however. See, e.g., Matthew W. Finkin, *Revisionism in Labor Law*, 43 *MD. L. REV.* 23 (1984); Matthew W. Finkin, *Does Karl Klare Protest Too Much?*, 44 *MD. L. REV.* 1100 (1985).

352. Klare, *supra* note 351, at 267–69; see also *id.* at 319 (listing the primary decisions).

For example, five million private-sector workers organized in the forty-eight months preceding 1937—an astonishing 68 percent of the total membership today—by sitting down and refusing to work.<sup>353</sup> By 1939 the Supreme Court said they could be fired for doing just that.<sup>354</sup> Soon, other decisions clarified that they could also be fired for doing some, but not all, of their tasks or for working more slowly.<sup>355</sup> The option that remained, striking and leaving, remained protected only in the narrowest sense: a willing worker could replace the striker, in the run-of-the-mill case “permanently.”<sup>356</sup>

The judiciary also had a swift impact on unions, reconceptualizing them as institutional “fiduciar[ies]” with responsibilities not only to their own members but to society at-large as keepers of the public trust.<sup>357</sup> This came with, on the one hand, an understanding that unions were generally to engage in “responsible” civic conduct, and it also ushered in an “unstated proviso that unions wishing the protection of the Board had to keep their members in line.”<sup>358</sup>

In a numbers sense, labor’s new fiduciary cloak and the loss of its most confrontational tools didn’t seem to hurt. By the 1950s one out of every three private sector workers was a union member, a density so robust that union contracts often set pay and benefit standards across entire communities.<sup>359</sup> The membership rate, combined with the post-war ideological embrace of “industrial pluralism,” which led to “widespread use” of arbitration clauses in bargaining contracts and required lots of resources to run the system, led to the

353. NELSON LICHTENSTEIN, *STATE OF THE UNION 50–52* (2002). There are 7.4 million private sector union members, 6.6 percent of the private sector workforce. *Union Members Summary*, BUREAU LAB. STATS. (Jan. 28, 2016, 10:00 AM), <http://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/4V3U-MVBS>]. It is difficult to overstate the power, prevalence, and organizing effectiveness of sit-down strikes during this period. For a sense of this history, see BRECHER, *supra* note 347, at 206–16.

354. *Nat’l Labor Relations Bd. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256–61 (1939).

355. *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1594–95 (1954) (holding that a “partial strike”—here refusing to work overtime—is unprotected conduct); *In re Elk Lumber Co.*, 91 N.L.R.B. 333, 336–37 (1950) (holding that working more slowly than usual is unprotected conduct).

356. The right to permanently replace turns on strikers’ motives. Employers are allowed to keep replacement workers after a strike has ended if the stoppage is based on purely economic motives. *Nat’l Labor Relations Bd. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). Employers must return strikers to their previous positions if the stoppage is motivated (even in part) by employer illegalities. *R & H Coal Co.*, 309 N.L.R.B. 28, 28–29 (1992).

357. Klare, *supra* note 351, at 319–20; *see also* CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS* 160 (1985) (“[T]he Board was prepared to use [its] authority to force unions to conform to new theories of organizational and representational legitimacy. . .”).

358. *Id.*

359. Jake Rosenfeld, *Little Labor: How Union Decline Is Changing the American Landscape*, PATHWAYS 3 (Summer 2010), [http://web.stanford.edu/group/scspi/\\_media/pdf/pathways/summer\\_2010/Rosenfeld.pdf](http://web.stanford.edu/group/scspi/_media/pdf/pathways/summer_2010/Rosenfeld.pdf) [<https://perma.cc/7HVQ-2NWL>]. A recent analysis suggests that 20 to 30 percent of wage inequality’s modern growth is attributable to union membership losses in the interim. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 519 (2011).

only era where the term “Big Labor” actually made some descriptive sense.<sup>360</sup> In the 1980s that equated to 175,000 unique agreements administered by seventy thousand separate unions covering around twenty million workers—a labor relations landscape that historian Nelson Lichtenstein labeled “positively baroque.”<sup>361</sup>

Many unions smartly consolidated in the 2000s (thoughtful coordination allowed for one new “local” that spanned six states and another that absorbed 240,000 members), but that did not change the basic need for many people to handle a massive number of contracts, grievances, and resources.<sup>362</sup> Though today density sits at less than 7 percent, unions annually receive \$18 billion in dues, oversee somewhere in the neighborhood of \$3 trillion in pension funds, and have access to \$3 billion in saleable assets.<sup>363</sup>

### 1. *The “Sweet Spot of Weakness”*

The upshot is that by 2012 leaders interested in turning labor’s fortunes faced a fundamental dilemma. Unions today are member poor but, in an absolute sense, asset rich, a condition journalist Richard Yeselson has impeccably described as the “sweet spot of weakness.”<sup>364</sup> What he means is that labor has too few members to go blow-for-blow with capital, but so much infrastructure that—given bad law—it would be too dangerous to seriously try.<sup>365</sup>

He’s right. Unions may be historically small, but there is still a lot to lose. In a vacuum, maybe some ultrapowerful, hyperaggressive organizing strategy exists to fix the membership problem. But the disintegration of lawful militancy post-1935 means that whatever it is probably cannot be done responsibly. As the current and former general counsels of the AFL-CIO have written, union lawyers who end up in court essentially have to divert judges from the law’s modern developments to make the union’s case, “a bit like anthropologists, if not paleontologists, having to dig through the layers of

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360. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1524-25 (1981). Labor scholars, prominently Archibald Cox, were central figures in making industrial pluralism a dominant workplace ideology and in advocating for arbitration as an alternative to judicial enforcement of contract provisions. See also Rosenfeld, *supra* note 359, at 3 (“[W]hat’s strange is the continued use of ‘Big Labor’ as a shorthand moniker for trade unions in the contemporary United States.”). See generally Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

361. LICHTENSTEIN, *supra* note 353, at 142; see also GOLDFIELD, *supra* note 34, at 11.

362. MOODY, *supra* note 35, at 189–90.

363. See Craig Becker, *What Should Unions Do Now?*, DISSENT MAG. (Fall 2015), <https://www.dissentmagazine.org/article/future-labor-what-should-unions-do-now> [<https://perma.cc/GW7B-F66P>]; see also John Adler & Jay Youngdahl, *The Odd Couple: Wall Street, Union Benefit Funds, and the Looting of the American Worker*, 19 NEW LAB. F. 80, 81 (2010).

364. Josh Eidelson & Sarah Jaffe, *Belabored Podcast #12: Hold the Fort?*, DISSENT MAG. (July 1, 2013), <http://www.dissentmagazine.org/blog/belabored-podcast-12-hold-the-fort> [<http://perma.cc/KXZ6-3ZCU>].

365. *Id.* at 20:23.

sediment and other deposits to reach the original purposes of the Act.”<sup>366</sup> The most potent fixes were boxed in years ago through judicial narrowing of “legitimate” conduct and unwrapping them today on a scale appropriate to the downturn would put what unions took eighty years to build up—dues, buildings, contracts, jobs, allies, families—at outrageous legal risk.<sup>367</sup>

To take an obvious example, replicating the actions that brought the auto industry to its negotiating knees by coordinating multiday, even multiweek, seizures of service space at Walmart and McDonald’s is a tantalizing thought.<sup>368</sup> But under modern doctrine, that strategy would lead, at minimum, to injunctions, firings without remedy, and fines so massive that UFCW’s and SEIU’s operating viability could be endangered.

Simply put, where today’s inspired fights for workplace dignity veer into extralegal conduct—and, because the foes are so strong, the causes so critical, and the law so constrained, they sometimes do—the cost of courage is severe. A 1989 United Mine Workers strike, which involved sit-down protests and other stirring but forbidden acts under contemporary doctrine, led to court injunctions barring even basic militancy like “obstructing ingress and egress to company facilities . . . and picketing with more than a specified number of people at designated sites.”<sup>369</sup> Undaunted, the union’s continued solidarity resulted in thousands of arrests and over \$64 million in fines.<sup>370</sup> Even modern “comprehensive campaigns,” where UFCW, SEIU, and other unions have brilliantly partnered with community allies to convince companies to respect workers’ rights, have increasingly faced fire under new and seemingly

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366. Jonathan P. Hiatt & Craig Becker, *At Age 70, Should the Wagner Act be Retired? A Response to Professor Damm*, 26 BERKELEY J. EMP. & LAB. L. 293, 294–95 (2005); see also Craig Becker & Judith Scott, *Isolating America’s Workers*, NATION (Sept. 13, 2012), <http://www.thenation.com/article/isolating-americas-workers> [https://perma.cc/9P8X-H4RF] (“[The NLRA’s] legal foundations have been eroded by Court rulings over the past forty years . . .”).

367. See JOE BURNS, REVIVING THE STRIKE 179 (2011) (describing the practical realities of this legal risk).

368. ZIEGER, *supra* note 348, at 46–51.

369. *Int’l Union v. Bagwell*, 512 U.S. 821, 823–24 (1994).

370. *Id.*; see also RICHARD A. BRISBIN JR., A STRIKE LIKE NO OTHER STRIKE 2–3 (2002) (noting that though the Supreme Court later vacated the levies, it was for purely procedural reasons, and the union was still forced to settle dozens of strike-related lawsuits); *Bagwell*, 512 U.S. at 838–39. The Communications Workers of America’s (CWA) 1996 attempt to organize Los Angeles-Long Beach Port truckers is also instructive. See RUTH MILKMAN, L.A. STORY 177–84 (2006). There, the campaign’s most successful tactic—courageous picketing by hundreds of angry truck drivers that wiped out 80 percent of the port’s operations—led to a temporary restraining order that capped the number of allowable protestors at an impotent ten. *Id.* at 182; Bill Mongelluzzo, *Probe of Leasing Firm Sought*, JOC.COM (May 9, 1996, 8:00 PM), [http://www.joc.com/probe-leasing-firm-sought\\_19960509.html](http://www.joc.com/probe-leasing-firm-sought_19960509.html) [https://perma.cc/8Z3G-QW98]. Faced with the choice of arrests and enormous fines that risked institutional annihilation or giving the tactic up, the union gave it up. See *id.* Port traffic resumed, and the CWA’s campaign fizzled. *Id.*; MILKMAN, *supra* at 183.

outlandish legal theories that gain judicial credence on the fly while draining union resources severely in the process.<sup>371</sup>

The law, which once facilitated institutional stability, now endangers the long-term viability of the project by commanding a choice between tactics that are, over the long haul, inadequate to the enormous task of challenging corporate power—or rolling the dice in court. Put another way, if unions really wanted to throw off the gloves and go for the chin, the referee would jump in, and they would have to defend their right to fight at all before the boxing commission.

Though unions had long chafed under this legal straightjacket, in 2012 it seemed to provoke an especially acute membership anxiety. It also prompted a critical reflection: Is there a way for labor to finally get out from under the accumulated weight of law boxes and spark significant movement change without threatening the whole edifice? For at least UFCW and SEIU, the answer was improvisation, doing double-duty not simply as the social practice described in Part III, but as a legal strategy.

### B. *Yes-Anding the Law*

Improvisation as a law strategy rested on the core insight that the style could be hitched to something eye-popping, assertive, and, most indispensably, *legal* all at once: a full and complete cessation of work to protest an employment condition.<sup>372</sup> Here, at last, was a narrow yet flashy through-line between and around the common law pileup of workplace “don’ts” that had incubated the “sweet spot of weakness” in the first place.<sup>373</sup>

Indeed, improvisation theorists have a name for things that conventional wisdom says are not to be done. They call it “disciplinary knowledge,” and improvisation eats disciplinary knowledge for lunch.<sup>374</sup> Among workers the unions could identify and meet, one-day strikes could be floated and cheered. Among those the unions could not, the possibility of striking autonomously could be dangled. And the beauty was that so long as everyone basically put one foot in front of the other, the employment risk to workers, and the overall risk to the institutions, would be manageable.

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371. See Oswalt, *supra* note 42, at 831 nn.182–84, 833 (describing the two most common challenges and stating that, “[e]ven if unsuccessful, these lawsuits are incredibly costly and for that reason alone can halt organizing in its tracks”); Garden, *supra* note 214.

372. See *infra* note 387.

373. While a one-day strike may not seem all that innovative, consider that labor and scholars alike had long viewed the Supreme Court’s meddling with the law of stoppages as having “rendered the strike useless and virtually suicidal.” Estlund, *supra* note 42, at 1538. James Gray Pope’s statement that by 2004 the strike right had become so depleted that “it now serves as a source of *employer* bargaining power” nicely encapsulates pre-2012 thought. See James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 528 (2004).

374. See FISCHLIN ET AL., *supra* note 30, at xxii (“[D]isciplinary knowledge teach[es] us that there is a time and a place for everything—that people need to be on time and to stay in their place.”).

An added attraction of the approach was its potential to maximize worker agency, creativity, and courage in ways that felt genuinely new in the modern organizing era. Improvisational strikes mean that workers retain essential authorship over the actions, reimagining ties between unions as institutions and workers as activists. Courageous employees alone would have the power to yes-and on strike day, or any other day, whether a union staffer was around or not. How they pulled it off—skipping, shouting, singing, or seriousness all do the trick—was a design of their own making.<sup>375</sup> Cooks and clerks could strike for \$15 and a union, \$13 and a pension, more hours, less burns, or really just because. As Daniel Fischlin has written with eloquence, “In a world filled with paths we can or must take, improvisation compels us to think about the paths we can make.”<sup>376</sup> For fast-food and retail strikers, those paths are intensely personal, even intimate.

Perhaps most critically, improvisation would allow for employee engagement to keep expanding in ways that could avoid many of the labor law shadows that underlie antiunion injunctions, fines, and damages.<sup>377</sup> Unions detail legal strike techniques in the strike kits and, where possible, explain the law in person to workers and walk-back participants. But fundamentally, unions’ hands are off the wheels because in many cases the activism has been inspired, not organized, so there is no wheel. With improvisational unionism workers strike, react, and push back, here, there, everywhere, nowhere, and places in between. No one—not supporters, not officials, and not employers—knows where invitations to act will be accepted, who or how many will show up if they do, what the improvisers will say, or how they will be received. This type of handed-off, strewn-about activity maximizes militancy while minimizing the risk that a court will step in and say to the union “no more” or “here’s the bill.”

In sum, improvisational unionism offers labor access to the effervescent, frenzied mobilizations of the pre-Wagner era while simultaneously managing the legal and institutional concerns inherent in workplace activism because of how the law developed in the interim. Put otherwise, improvisation acts as a generative tool for the chaos unionists have pined for ever since the Supreme Court got its pens on the Wagner Act, but it doubles as a legal strategy because the commotion is cabined by one-day, full-on stoppages so that injunctions, fines, and other dangers do not pop up to crush the spirit and imperil the union. At its best, improvisational unionism really does tear up the script.

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375. Such conduct harkens back to the “informal gaiety and creativity” that infused sit-down strikes in the 1930s. BRECHER, *supra* note 347, at 197, 216. Singing, dancing, whistling, and music-making were all part of building cooperation and community during those stoppages. *Id.*

376. FISCHLIN ET AL., *supra* note 30, at xii.

377. See Eidelson & Jaffe, *supra* note 364, at 38:25 (discussing similar possibilities for “go[ing] beyond the sweet spot of weakness”).

C. *Diminished but Not Defeated: The Enduring Shadows of Legal Boxes*

Of course, cabined or not, chaos means things can get messy. As a legal strategy, improvisation has to thread a narrow doctrinal needle, and from time to time someone is bound to miss the eye. A lone worker might strike for a purely idiosyncratic reason, failing to fulfill the Wagner Act's concerted-protest requirement.<sup>378</sup> Or a single worker might meet the concertedness requirement by trying to induce others to action, but do so with such disruptiveness that protection is lost in any event.<sup>379</sup> Autonomous mobilization means picketing, which has come to encompass merely "confrontation in some form," can arise in legally undesirable settings, since who and how many show up cannot really be controlled.<sup>380</sup>

Improvised messaging may raise the thorniest issues. UFCW had very limited power to shape how Christopher Owen, the Oklahoma Walmart associate who struck after reading about OUR Walmart online, described the goals of his one-man operation to an interested reporter.<sup>381</sup> Nor could SEIU have effectively policed the impromptu in-store rally and sidewalk picket that coalesced after a New York City Wendy's refused to let a striker go back to work.<sup>382</sup> What was said (and how it was said) was up to the councilmember interacting with the Wendy's manager, the community supporters who comprised the walk-back team, and the customers in the store who were urged to leave.<sup>383</sup> Defamation is a concern in these scenarios, but the NLRA's anachronistic policing of protest objectives under section 8(b)(7)(C) is even more worrisome.<sup>384</sup> Indeed, for parts of 2013 the Board stopped OUR Walmart

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378. *Mushroom Transp. Co. v. Nat'l Labor Relations Bd.*, 330 F.2d 683, 685 (3d Cir. 1964) (stating that concerted speech requires "at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees").

379. *See, e.g.*, *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248–49 (1997) (describing "the sort of behavior which withdraws the protection of the Act from concerted activity").

380. *Chi. Typographical Union No. 16*, 151 N.L.R.B. 1666, 1669 (1965). Traditional campaigns can avoid picketing's capacious definition requirements by ensuring there is adequate physical space for rallies and setting ground rules with activists beforehand. But improvisational protests are held on sidewalks outside of store entrances no matter the number of participants and available square footage. Press photos from fast-food strike days, for example, show rows of workers and supporters stuffed between the street and store entrances, and on the inaugural Black Friday protest fifteen hundred activists merged at a single Paramount, California Walmart. *See, e.g.*, Hsu & Semuels, *supra* note 165; Eidelson, *supra* note 160; Eidelson, *supra* note 8. For an analysis of some of picketing's risks in the alt-labor context, see Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837 (2014).

381. *See* Eidelson, *supra* note 8.

382. *See supra* note 323.

383. *Id.*

384. *See* Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1, 32–38 (2009) (noting the frequency of employer-backed defamation suits against unions and workers). For a constitutional and practical critique of the Act's treatment of recognitional and organizational picketing, see Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015).

activism in its tracks simply by alleging, without analysis, that the group's avowed interest in fixing workplace injustices was just a smokescreen for its true (and, under the circumstances, illegal) purpose of unionizing Walmart.<sup>385</sup>

All of this is to say that the improvisational style hardly extinguishes legal risk. But that just puts it in the same category as every other approach to mobilization that labor has ever tried. The real difference is that unlike other innovations, improvisational unionism's relationship to the law is comparatively humble. Labor's most successful strategies to date—agreements with employers to organize NLRA-covered employees and arrangements with states to adopt non-NLRA employees as their own—exert control over the law's substance. Both are premised on transforming extant rules on unionization prior to activism. Improvisational unionism, on the other hand, is not so proactive. It is unconcerned with changes to the legal architecture, and, in effect, urges workers to run headlong into it. In practice this suggests that unions have made a calculation that the benefits of improvisation outweigh the level of institutional and worker risk that arises when the law is foregrounded in this way.

One specific vulnerability, however, stands out. Labor law does not favor repeated strikes. Since at-will strikes sit at the center of improvisational unionism, this legal risk deserves extended treatment.

## V.

### IMPROVISATIONAL UNIONISM AND THE LAW OF INTERMITTENT STRIKES

In its current form, improvisational unionism boils down to two new tactics—strikes and autonomous mobilization—and a fresh vision of campaign culture that embraces open procedures, prioritizes process over ends, and capitalizes on an experimentalist spirit. Relative to what has come before, this three-part package feels almost audacious. But from another angle, improvisational unionism might be considered modest. By inviting a broad swath of workers and the public to engage in activism without the pretense that large numbers will take the bait anytime soon, improvisational unionism is essentially reactive in its approach to organizing. It welcomes people on their own terms, and its ambition is simply that a thicker layer of participants—some who have been in close contact with the campaigns and others who just show up—will be skimmed off next time.

But that ambition carries with it a necessary element. There has to actually be a “next time.” It is the opportunity to improvise repetitively that builds activists' confidence and allows the campaign to progressively add

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385. See Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, N.Y. TIMES (Jan. 31, 2013), <http://www.nytimes.com/2013/02/01/business/labor-union-agrees-to-stop-picketing-walmart.html> [<https://perma.cc/W7R7-LU7K>] (referencing Advice Memorandum, Wal-Mart Stores, Inc., No. 26-CP-093377 (Jan. 30, 2013)).

numbers.<sup>386</sup> Repetition is fundamental to improvisational unionism, and to the extent it is constrained, the approach itself is endangered. If each additional walkout carries more legal risk than the last, there are bound to be fewer stoppages.

In fact, repetitive strikes do come with a specific legal risk: the judicially created law of intermittent strikes. As argued below, the rule is tangled, bankrupt, and should be eliminated. But even if it remains good law, it is ultimately inapplicable to improvisational unionism.

#### A. *Tangled Doctrine*

As noted, improvisational unionism as a legal strategy holds tight to the reality that for all of the weaknesses of labor law (and there are many), it does protect the plain-vanilla strike over working conditions. That's defined, essentially, as stopping work, safely shutting down any equipment, and quitting the employer's property entirely.<sup>387</sup> So when fast-food workers sick of low pay or Walmart employees fed up with disrespect walk out and shout on a sidewalk during a scheduled shift, they cannot lawfully be fired.<sup>388</sup>

The problematic question for improvisational unionism is how many times can they do it? Here the law is tangled. The confusion began in *Briggs-Stratton*, a 1949 Supreme Court case that involved a union's attempt to pressure an employer in bargaining by calling twenty-six surprise "special meetings" during working hours over a four-month period.<sup>389</sup> Alarmed that this "new technique" left the company in the dark "as to when or whether the employees would return," and by how easily it facilitated the union's stated intention to repeatedly "interfere with production," the Court summarily

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386. As improv researchers have explored, "[I]mprovisational actions may serve as experiments that shape future behavior" by creating memories of past improvisational experiences that can be built upon. See Moorman & Miner, *supra* note 237, at 713.

387. The classic case is *National Labor Relations Board v. Washington Aluminum Co.*, 370 U.S. 9 (1962). There, when seven Baltimore machinists showed up at work on a frigid January morning in 1959 to find the heat broken, an icy wind gusting through flimsy exterior doors, and their foreman helpless to intervene, they left. *Id.* at 11–12. When the company president showed up and fired them all in absentia, the Supreme Court concluded that section 7, which shelters group protests over working conditions, extends to a walkout. *Id.* at 12, 17. That the machinists were not in a union or even necessarily contemplating unionization was irrelevant in the Court's eyes and only made the decision to abandon their jobs more logical: without a representative to negotiate for them and lacking a clear avenue to express workplace complaints, "[T]he men took the most direct course to let the company know that they wanted a warmer place in which to work." *Id.* at 14–15; see also Craig Becker, "Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the *National Labor Relations Act*, 61 U. CHI. L. REV. 351, 354–55 (1994).

388. The workers could, however, be replaced by other workers while they are gone. See MOODY, *supra* note 35.

389. *United Auto. Workers Local 232 v. Wis. Emp't Relations Bd. (Briggs-Stratton)*, 336 U.S. 245, 249 (1949).

deemed the strategy “indefensible.”<sup>390</sup> Though the decision’s actual holding was only that the union’s conduct could be subject to a state injunction,<sup>391</sup> eleven years later the Court relied on it for the general principle that the underlying tactic—the so-called “intermittent” strike—lacks NLRA protection, thus employees who repeatedly stop working may be discharged.<sup>392</sup> That is the law today.

Unfortunately, as Craig Becker has persuasively argued, the decisions left much unstated, including the all-important question of how many stoppages over a given span are too many.<sup>393</sup> On this question the Board and courts have been left to fill in the blank. The only clear answer is that two strikes are never enough, while as many as five stoppages could be okay if there is enough time between them, say, at least five weeks with a two-year lag between the first and last actions.<sup>394</sup>

Much more critical is the matter of whether the strikes are a “part of a plan or pattern of intermittent action” in service to a unified goal or demand.<sup>395</sup> The evil here is seen to be two-fold.<sup>396</sup> First, protecting a scheme to quit

390. See *id.* at 249, 254–60; see also Becker, *supra* note 387, at 377–78 (detailing the Court’s skeletal reasoning and inexplicable failure to “set forth any . . . standard by which to judge whether particular strikes are indefensible”).

391. Becker, *supra* note 387, at 377. As Craig Becker has pointed out, “[T]he Court expressly distinguished the injunction at issue in *Briggs-Stratton* from the discharge of intermittent strikers, underscoring the fact that only the question of state action was raised.” *Id.* at 377 n.121. In *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 154 (1976), the Supreme Court “expressly overruled” *Briggs-Stratton*’s holding on the appropriateness of the state court injunction.

392. Nat’l Labor Relations Bd. v. Insurance Agents’ Int’l Union, 361 U.S. 477, 492–94 (1960); see also Becker, *supra* note 387, at 380–81 (detailing this progression). Because “intermittent work stoppages are not unfair labor practices under the NLRA,” they do not subject unions to the Board’s remedial scheme. *Pan Am. World Airways, Inc. v. Int’l Bhd. of Teamsters*, 894 F.2d 36, 40 (2d Cir. 1990). The brunt of intermittent strike costs are thus borne by employees themselves.

393. Becker, *supra* note 387, at 391.

394. *Robertson Indust.*, 216 N.L.R.B. 361, 362 (1975) (stating that there is no “magic number” but “2 days” is not enough), *enforced*, 560 F.2d 396 (9th Cir. 1976); *Chelsea Homes, Inc.*, 298 N.L.R.B. 813, 831 (1990) (“[T]wo [work] stoppages, even of like nature, are insufficient to constitute . . . a pattern of recurring, and therefore unprotected, stoppages.”), *enforced*, *Lee v. Kropp*, 962 F.2d 2 (2d Cir. 1992); N.L.R.B., Advice Memorandum, University of Southern California, Case No. 31-CA-23538 (Apr. 27, 1999) (citing “gaps in time” and that the stoppages were “so far apart in time” as evidence that five strikes over two years were not unprotected intermittent conduct).

395. *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972). The leading labor law treatise makes clear that evidence of a “systematic scheme” is crucial to an intermittent finding. ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 429 (2004); see also THE DEVELOPING LABOR LAW 1705 (John E. Higgins ed., 2012) (calling a “plan” a “precondition of finding an intermittent strike”).

396. The rationales provided for finding intermittent work stoppages unprotected overlap with a closely related—but frequently confused—type of action, the “partial” strike. Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 116 n.118 (2007). In a partial strike employees “refuse to work on certain assigned tasks” but remain on site while continuing to be paid. *Id.* Craig Becker has pointed out that to the extent the common justifications for outlawing either type of strike are at all persuasive, it is only in the context of partial strikes. Becker, *supra* note 387, at 383–90.

repeatedly would let workers generate “condition[s] that would be neither strike nor work” and, “in effect[,] . . . dictate the terms and conditions of employment.”<sup>397</sup> Working on one’s “own terms” instead of management’s “has long been thought ‘indefensible’ and a cause for discharge.”<sup>398</sup> Second is a sense that sustained intermittent activity is too powerful.<sup>399</sup> At minimum, recurrent stoppages are thought to make business operations “impractical,” ostensibly because it is difficult to hire replacements at random times, and more generally because it is assumed to raise payroll, timekeeping, and production havoc.<sup>400</sup> At worst intermittent strikes could “harass the company into a state of confusion”<sup>401</sup> and “crippl[e] it.”<sup>402</sup>

Identifying whether an intermittent plan exists, however, is easier said than done. That’s because even repeated, short strikes are not part of a prohibited intermittent “plan” if they are spontaneous and sparked by discrete grievances—like a cancelled meeting one day and a fired coworker the next—instead of a single overarching demand.<sup>403</sup> Particularly complicating is the fact that the Board also recognizes that intimately related grievances may nevertheless be considered “distinct” for intermittent purposes.<sup>404</sup> Included in this category is a case where workers struck, returned to work, struck again to protest retaliation from the first strike, returned to work, and struck a third time to protest retaliation from the second strike.<sup>405</sup> According to the Board, “each

397. *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1595 (1954); *see also Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1809–10 (1954) (finding consecutive weekend strikes unprotected for “establish[ing] and impos[ing] upon the employer their own chosen conditions of employment”); *Polytech, Inc.*, 195 N.L.R.B. at 696 (calling intermittent strikes unprotected because they are “inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer”).

398. *GORMAN & FINKIN*, *supra* note 395, at 430 (citing Nat’l Labor Relations Bd. v. *Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946)).

399. The *Briggs-Stratton* dissent suggested that the majority found the union’s meeting strategy “objectionable . . . only because it [was] effective.” *United Auto. Workers Local 232 v. Wis. Emp’t Relations Bd.*, 336 U.S. 245, 269 (1949) (Murphy, J., dissenting).

400. In *Shelly & Anderson Furniture Manufacturing Co. v. National Labor Relations Board*, 497 F.2d 1200, 1203 (9th Cir. 1974), the Ninth Circuit cited these fears while stating that “protesting employees continue to draw their wages,” a puzzling conclusion since striking employees need not be paid. The court may have been influenced by the employer’s position in *Briggs-Stratton*, which was heavily rooted in administrative concerns. *See* 336 U.S. at 269.

401. *See Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1548 (1954).

402. *See* N.L.R.B., Advice Memorandum, *Land Mark Electric*, No. 31-CA-21751 (May 17, 1996).

403. *See City Dodge Ctr., Inc.*, 289 N.L.R.B. 194, 197 (1988) (deeming an intermittent analysis inappropriate for a lack of a “plan” where workers struck once when refused a meeting and again when a colleague was discharged); *see also Becker*, *supra* note 387, at 396–98.

404. *See WestPac Elec., Inc.*, 321 N.L.R.B. 1322, 1360 (1996).

405. *Id.* Another good example is *Farley Candy Co.*, 300 N.L.R.B. 849, 849 (1990), where workers in the pan department struck in support of better wages and hours, to no avail. Later that day, workers in the packaging department did the same, and this time management agreed to make a change to the packaging employees’ schedule. *Id.* The following day, pan department workers struck again “in support of their prior concerted demands.” *Id.* The Board found the pan department workers were not intermittent strikers because the second strike was not a second iteration of their initial

strike was ‘unique to its facts and circumstances,’” even though “discrimination against returnees” equally motivated the last two.<sup>406</sup>

This “intimate” yet “distinct” concept has proved malleable enough to even cover instances where there is a conceded plan to strike repeatedly before actual grievances arise.<sup>407</sup> In *Norfolk Shipbuilding*, the union president implemented an “in plant solidarity program” amid stalled negotiations, with the overall goal of obtaining contract leverage and fixing safety problems arising on the dock.<sup>408</sup> While the program envisioned some ancillary measures like off-work rallies, its crux—acknowledged by the president and foreshadowed by an internal newsletter—was many short strikes.<sup>409</sup> The union in fact pulled off ninety-nine strikes in twenty-two days.<sup>410</sup> Nonetheless, the Board’s General Counsel linked each stoppage to an extemporaneous “complaint or grievance and/or . . . separate unlawful act,” from tardy paychecks to misused tools, saving the actions from intermittent allegations.<sup>411</sup> In the General Counsel’s eyes, the union’s plot to continually strike for a good contract was best viewed as “simply taking the position that, if there were [unfair] [e]mployer conduct, such conduct would not be ignored.”<sup>412</sup>

An express plan for periodic strikes is also found in *Blades Manufacturing*, where a newly certified union, faced with an employer that refused to negotiate, called a group meeting and decided to strike for a single day every time management refused to discuss a grievance.<sup>413</sup> Following three walkouts over thirteen days the company fired all the strikers.<sup>414</sup> Unlike in *Norfolk Shipbuilding*, here the Board acknowledged that the underlying spark for each stoppage was more or less the same—in its words, “the refusal to recognize the right of the Union to represent an employee in the processing of a grievance”—but parsing the unique substance of each complaint allowed it to similarly conclude that “[e]ach walkout was precipitated by, and was in protest against, a separate unlawful act.”<sup>415</sup>

In the end, cases like *Norfolk Shipbuilding* and *Blades Manufacturing* come down to motive.<sup>416</sup> In *Norfolk Shipbuilding*, shipyard employees were

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demand but rather a distinct “reaction to the [employer’s] decision the previous day to address the packaging department employees’ demands,” and not their own. *Id.*

406. WestPac Elec., Inc., 321 N.L.R.B. at 1360 (quoting Chelsea Homes, Inc., 298 N.L.R.B. 813, 831 (1990)).

407. Identifying the lawfulness of such a strategy is the basis for Craig Becker’s 1994 article, *supra* note 387, at 408–13.

408. N.L.R.B., Advice Memorandum, *Norfolk Shipbuilding & Drydock Corp.*, No. 5-CA-21113, at 18 (Nov. 7, 1990).

409. *Id.* at 2, 7, 18.

410. *Id.* at 1.

411. *Id.* at 16.

412. *Id.* at 18.

413. *Blades Mfg. Co.*, 144 N.L.R.B. 561, 563, 565 (1963).

414. *Id.* at 566.

415. *Id.*

416. See Becker, *supra* note 387, at 410–13.

undoubtedly incensed by, for example, a broken promise to disburse paychecks early, which came across as discriminatory and stopped many from getting paid until later in the week.<sup>417</sup> But they also had a clear strategy in place to get a strong contract: repeated strikes. So it is difficult to fault the Eighth Circuit all that much for concluding, contrary to the Board, that the *Blades* factory strikes were aimed not at distinct grievance-handling complaints but really the singular goal of union recognition since that was, in fact, the “plan.”<sup>418</sup> Human nature dictates that most people have mixed motives for doing things, and that makes the intermittent analysis difficult.<sup>419</sup> The NLRB’s own Frankenstein-esque summary of the law after nearly sixty years of development crystalizes the challenge well, casting the search for illegal intermittent strikes as an unwieldy investigative mélange touching on strike frequency, proximity, duration, goals, employer impact, employee impact, and strategic intent, whether stated or implied.<sup>420</sup>

### B. Untangling Doctrine by Marginalizing It

Before diving into the relationship between intermittency and improvisational unionism, it is worth questioning whether this doctrinal morass should prompt the Board to take a step back, recognize that the law has become practically and theoretically unworkable, and—assuming the Supreme Court does not revisit *Briggs-Stratton*—drastically limit its application. It should. This is a more modest suggestion than it might seem.

To begin, there is the statute. Intermittent doctrine is pure judge-invented law, grafted onto and irreconcilable with the NLRA’s plain text, which commands that “[n]othing” is to “interfere with or impede or diminish in any way the right to strike,”<sup>421</sup> and its intent, which puts the “right to strike at its

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417. *Norfolk Shipbuilding*, *supra* note 408, at 12.

418. *See Nat’l Labor Relations Bd. v. Blades Mfg. Corp.*, 344 F.2d 998, 1005–06 (8th Cir. 1965).

419. This is Craig Becker’s point. Becker, *supra* note 387, at 413 (“[E]xisting case law has articulated no coherent standard for distinguishing among workers’ predictably mixed motives.”). His solution—protecting repeated strikes if they are “motivated in any part by discrete grievances”—deserves a careful look from the Board. *Id.* at 415.

420. According to the Board’s General Counsel, “particular aspects of strike activity that may render it unprotected” are: (1) the occurrence of more than two separate strikes, or threats of repeated strikes; (2) the strikes are not responses to distinct employer actions or problems with working conditions, but rather part of a strategy to use a series of strikes in support of a single goal because this would be more crippling to the employer or would require less sacrifice by employees than a single prolonged work stoppage during which strikers could be replaced; (3) the union announces or otherwise states its intent to pursue a plan or strategy of intermittent strikes, or there is clear factual evidence of an orchestrated strategy to engage in intermittent strike activity; and (4) the strikes are of short duration and proximate in time. N.L.R.B. Advice Memorandum, *WestFarm Foods*, No. 19-CA-29147, at 8–9 (Jul. 22, 2004).

421. 29 U.S.C. § 163 (2012); *Div. 1287, Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Missouri*, 374 U.S. 74, 82 (1963) (cited in Becker, *supra* note 387, at 352).

core.”<sup>422</sup> There is also logic. Obviously “the right to strike cannot forever be exhausted after it is exercised once.”<sup>423</sup> Case law, certainly, does not go that far. But precedent surely does suggest that even where workers have the undisputed right to strike once, “mere repetition” of that right somehow endangers the legitimacy of the right itself.<sup>424</sup>

Why, though, in a regime that relies on raw coercion to function, is the statutory right to coerce extinguished by doing it too much? Presumably the answer goes back to some especially persuasive cache of policy reasons. In this case, however, the justifications for removing the Act’s protection have always ranged from the clumsy to the absolutely nonsensical. Craig Becker’s analysis remains the gold standard here, noting that however many times workers exit the job, the doctrine’s *primary* rationale—that it creates a state of “neither strike nor work”—is Exhibit One in the nonsensical category: at one moment workers are clearly striking off the premises, at another moment they are clearly working on the premises, and, to be glib, that’s that.<sup>425</sup> As Becker points out, while it is possible to theorize a situation where workers repeatedly stop and start working while remaining at their posts, that factual scenario has never actually made an appearance in a relevant decision, in part because it would be categorized as a “slowdown,” a distinct category of unprotected activity.<sup>426</sup>

What’s more, workers who walk out repeatedly do not “unilaterally alter terms of employment” any more than other strikers who refuse to get to work when called upon and can’t be fired.<sup>427</sup> And it borders on silly to have to point out that even if repeated strikes are “impractical” or burdensome for business operations, that “is precisely the purpose of all strikes.”<sup>428</sup> Intermittent strikes are just over faster.

But perhaps the most important point is that in the twenty years since Becker’s article appeared, experience has sapped whatever persuasive force any of these rationales may once have had. Take planes for example. The airline industry—a time-is-of-the-essence business model if there ever was one—has been barred from firing or enjoining intermittent strikers under its own designated labor relations scheme since 1993.<sup>429</sup> Despite the tactic’s repeated use, air travel has not collapsed in the interim.<sup>430</sup> Likewise, under the

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422. ATLESON, *supra* note 31, at 19–21 (discussing this conflict).

423. Becker, *supra* note 387, at 391.

424. *See id.*

425. *Id.* at 385.

426. *See id.*

427. *Id.* at 387; *see also supra* note 387.

428. *See* Becker, *supra* note 387, at 388.

429. *See* Ass’n of Flight Attendants v. Alaska Airlines, 847 F. Supp. 832, 835–37 (W.D. Wash. 1993) (finding the firing of intermittent strikers “unlawful self-help” but allowing the airline a limited replacement right); Pan Am. World Airways, Inc. v. Int’l Bhd. of Teamsters, 894 F.2d 36, 40 (2d Cir. 1990) (barring injunctive relief for intermittent strikes).

430. Indeed, the Association of Flight Attendants has even developed a “trademarked strategy of intermittent strike activity” known as Create Havoc Around Our System (CHAOS). Carmen R.

Family and Medical Leave Act (FMLA) of 1993, workers have long been able to leave work intermittently, without notice, and without offering a clue as to when they will return.<sup>431</sup> Though employers complain about the timekeeping, paycheck, and other hassles this can create, the Department of Labor's regulatory guidelines have shown that even these challenges are administratively feasible.<sup>432</sup>

The practical workability of intermittent leave in these and other contexts has been enhanced by technological advances in scheduling that give employers the flexibility to manipulate staffing levels in real time, anytime. From the employee perspective, this sort of just-in-time management is personally disastrous and, in an ironic twist, creates *actual* states of “neither strike nor work” through painful practices like “open availability” where workers wait at home to be called in at a moment's notice; “call-in shifts” where workers must phone the boss in the early morning to find out if they will be needed; and automated, hour-by-hour schedule changes that send workers packing or rushing in pursuant to predictive sales algorithms or even a weather report.<sup>433</sup> For employers like Walmart and McDonald's, these innovations have been a cost-cutting boon, but they also mean that there is less legitimacy than ever to arguments that sudden workforce exits seriously disrupt production or are too powerful.<sup>434</sup> It is perhaps for this reason that the only comprehensive

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Parcelli & Elizabeth A. Roma, *Permissible, Protected, and Preferable: Intermittent Strikes Under the Railway Labor Act*, 25 A.B.A. J. LAB. & EMP. L. 259, 260 (2010).

431. See 29 C.F.R. § 825.203 (2013) (allowing intermittent leave); § 825.303 (2014) (requiring “notice to the employer as soon as practicable under the facts and circumstances” where the “need for leave is not foreseeable”); *Gienapp v. Harbor Crest*, 756 F.3d 527, 529 (7th Cir. 2014) (“[§ 303] . . . does *not* require employees to tell employers how much leave they need, if they do not know yet themselves.”).

432. 29 C.F.R. § 825.205 (2010) (describing how employers should calculate pay and scheduling for intermittent FMLA leave); see also PETER A. SUSSER, ON AGAIN, OFF AGAIN: INTERMITTENT LEAVE UNDER THE FMLA 1 (2007) (“Employees’ use of intermittent leave is probably the number one frustration that employers voice about the Family and Medical Leave Act (FMLA), particularly circumstances in which the need to use intermittent leave time is ostensibly unforeseeable and no advance notice is provided of the days on which such leave will be exercised.”).

433. STEPHANIE LUCE & NAOKI FUJITA, DISCOUNTED JOBS: HOW RETAILERS SELL WORKERS SHORT 12–14 (2012), [http://retailactionproject.org/wp-content/uploads/2012/03/7-75\\_RAP+cover\\_lowres.pdf](http://retailactionproject.org/wp-content/uploads/2012/03/7-75_RAP+cover_lowres.pdf) [<https://perma.cc/ER7S-UPM2>]; Jodi Kantor, *Working Anything But 9 to 5*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html> [<https://perma.cc/5WV3-AC73>]. The *New York Times* has catalogued the human impact of these practices, including an employee at Joe Fresh who “was scheduled to work just one day but was on call for four days—meaning she had to call the store each morning to see whether it needed her to work that day.” Steven Greenhouse, *A Push to Give Steadier Shifts to Part-Timers*, N.Y. TIMES (July 15, 2014), <http://www.nytimes.com/2014/07/16/business/a-push-to-give-steadier-shifts-to-part-timers.html> [<https://perma.cc/TH4Y-MZ4F>]. Another worker described commuting an hour to Popeyes “only to have her boss order her to go home without clocking in—even though she was scheduled to work.” *Id.*

434. See Becker, *supra* note 387, at 387–88; Greenhouse, *supra* note 433 (describing how maximum scheduling flexibility allows “managers . . . to keep costs down”).

study on the matter suggests that intermittent strikes are actually *less* costly to employers than a single, drawn-out stoppage.<sup>435</sup>

Finally, the Board should acknowledge that limiting the right to strike—the very “essence of collective labor activity” and the “pivot” point in our national labor relations regime—to prolonged stoppages practically eliminates the right for unorganized low-wage workers.<sup>436</sup> Long ago Adam Smith recognized industry’s inherent capacity to “hold out” longer than labor, and today it is simply unrealistic for the law to expect minimum-wage employees to forgo pay for days on end because they are getting burned or need a raise and have the bravery to do something about it.<sup>437</sup> In the service sector it is self-evident that a meaningful right to strike requires an associated right to return after short stretches, merely to live.<sup>438</sup> Management, certainly, has other coping mechanisms at its disposal that these workers—who have as much right to leverage economic power as their bosses—do not.<sup>439</sup>

The good news is that there is some evidence that the Board has started to accept some of these realities.<sup>440</sup> Now, given the rise of improvisational unionism, it should also concede the weaknesses of the intermittent doctrine as a whole and apply it rarely. Until that time, there are good reasons to think that even under current law most Walmart and fast-food workers can nevertheless dodge the claims when they arise.

### C. *Improvisational Strikes Are Not Intermittent Strikes*

The strikes conducted at Walmart and in the fast-food industry since 2012 are not unprotected intermittent strikes. The easiest case concerns workers who strike autonomously and have had no direct communications with a union. As Professor Michael Duff has noted, “little if any NLRB authority” suggests that the Board is likely to find intermittent conduct absent a union “planner” on the scene.<sup>441</sup> Any suggestion that general media coverage, website encouragement, or strike-kit language evidence an intermittent plan is totally detached from

435. Michael H. LeRoy, *Creating Order out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 257–58 (2000).

436. See Becker, *supra* note 387, at 351, 359.

437. *Id.* at 351–52.

438. For obvious reasons, getting Walmart and the fast-food industry to schedule *more* hours is a key concern for both campaigns. See Sarah Jaffe, *A Day Without Care*, JACOBIN (Apr. 2013), <https://www.jacobinmag.com/2013/04/a-day-without-care> [https://perma.cc/7453-29W9].

439. The power to hire replacement workers is a prime example. James Gray Pope also makes the obvious but still critical point that while the “departure of any particular employee will not seriously affect the employer’s revenue stream, . . . [t]he consequences are immediate and dire for the worker, who needs her paycheck to obtain the basic necessities of life . . . .” James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of ‘Involuntary Servitude,’* 119 YALE L.J. 1474, 1555 (2010).

440. See Care Ctr. of Kan. City, 350 N.L.R.B. 64, 67 (2007) (“Clearly, the fact that the strike may have been designed to . . . provide an incentive for employees to participate [by limiting its duration but repeating it] . . . does not render the strike unprotected.”).

441. Duff, *supra* note 396, at 117.

precedent, where taut union-member bonds are nearly always on display when the Board identifies such a strategy.<sup>442</sup>

The national strikes present different issues. The Black Friday walkouts and the bombast associated with the fast-food strikes are quite clearly coordinated by UFCW and SEIU. Even here, though, pinning unprotected conduct on the workers would be difficult. The first problem is basic and goes to the total number of actions associated with any particular employee. However large the Fight for \$15 strikes become, there are around fifty thousand fast-food workers in New York, and the first two strikes involved only two hundred and four hundred respectively—so over 99 percent of that closed universe had not struck even once as of April 2013.<sup>443</sup> OUR Walmart is less open about its numbers, but the proportions are probably similar. Moreover, the nature of improvisation means that strike participants and locations are not stable.<sup>444</sup> Post-strike management blowback at one store might zero-out activism for a subsequent walkout, so a Walmart or McDonald's strike in November 2012 may have led to no strikers at those same stores in 2013.

The second point goes to goals. It is much easier to identify an intermittent “plan” where a campaign has a relatively steady, overarching objective. It is no surprise, for instance, that the Board is most likely to deem strikes unprotected where it can find evidence of a neatly packaged, traditional aim, like union recognition or a good contract.<sup>445</sup> The Walmart and fast-food campaigns do not have that. They appear prepared to continue indefinitely and collect issues as they go. OUR Walmart started with nine demands, added maternity issues, and then provided workers with a laundry list of general employment rights to know, monitor, and “start defending.”<sup>446</sup> The fast-food campaign has more dependably set its sights on \$15 and unionization, but even there the wildly dispersed nature of the industry and the campaign make those goals far less concrete than, for example, a recognition pact from a single company.

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442. Indeed, all of the private sector intermittent strikes cited by a 2000 survey of the tactic involved already organized worksites where a union was in personal contact with the workforce. LeRoy, *supra* note 435, at 251–54; *see also id.* at 266 (finding stoppages unprotected where the union provided the employer with notices of its (known) members' intent to strike); Honolulu Rapid Transit Co., 110 N.L.R.B. 1806, 1808 (1954) (same).

443. *See* E. C. Gogolak, *City Council Hears Plea from Fast-Food Workers*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/nyregion/city-council-hears-plea-from-fast-food-workers.html> [<https://perma.cc/4X27-RFYV>]; Greenhouse, *supra* notes 159, 160.

444. *See, e.g.*, Colin Jeffery, *Fast Food Strikes to Skip St. Louis Thursday*, KTRS (Sept. 3, 2014, 1:47 PM), [www.ktrs.com/fast-food-strikes-to-skip-st-louis-thursday](http://www.ktrs.com/fast-food-strikes-to-skip-st-louis-thursday) [<http://perma.cc/FT7T-VJ6C>].

445. W. Melvin Haas, III & Carolyn J. Lockwood, *The Elusive Law of Intermittent Strikes*, 14 LAB. LAW. 91, 92 (1998).

446. *Employee Rights*, OUR WALMART, <http://forrespect.org/your-rights> [<https://perma.cc/X36U-KKH9>] (last visited Mar. 4, 2016).

More importantly, both campaigns have filed dozens of unfair labor practice charges at the Board, all prime fodder for individualized grievances that could negate an alleged orchestrated strategy, as in *Blades* and *Norfolk Shipbuilding*.<sup>447</sup> Indeed, improvisational unionism is, as already noted, all about the personal. An organizer might burst into KFC screaming about the minimum wage, but when fry-cook Derrick Langley yes-and'ed his way out the door it was because of grease burns.<sup>448</sup> And while analogous precedent is thin, in the one case involving a “nationwide campaign” to organize far-flung workers that has come up, the Board noted “no evidence” to connect multiple, multistate short strikes to an intermittent plan, even though the endgame, a recognition agreement at a single employer, was crystal clear.<sup>449</sup>

Third, the strikes have not been proximate to one another. While OUR Walmart has spearheaded a variety of job actions overall, the Black Friday stoppages are by far the biggest and are, obviously, 365 days removed from each other. As of mid-2015 the major fast-food strikes have occurred at intervals of five, one, four, three, five, nine, three, and four months respectively over a two-and-a-half year period. The breaks between strikes compare favorably with lags that the Board has previously deemed protected.<sup>450</sup>

Finally and most critically, even if UFCW and SEIU were found to have used continual strikes or threats of strikes as a definitive strategy to capture a single goal, it would not be “because” the approach is “more crippling to the employer.” Improvisational unionism is not about inflicting economic pain. It is about solidarity-building—and slowly at that. That is why the campaigns are content to embrace a phenomenon that heretofore would have been embarrassing: the solitary striker.<sup>451</sup> It is also why the few fast-food and OUR Walmart forays into civil disobedience have been conspicuously centered in

447. Indeed the fast-food campaign frequently captions its demand as “\$15 and the right to form a union without retaliation,” see, e.g., #Fightfor15, FIGHT FOR \$15, <http://fightfor15.org/petition/april15petition> [<https://perma.cc/5ZRD-BHXP>] (last visited Mar. 4, 2016), a nod to specific employer conduct that could form the basis for discrete strike motivations. See, e.g., Michael Rose, *Burger King Franchisee Violated NLRA by Disciplining Worker Activists, ALJ Finds*, DAILY LAB. REP. (Oct. 3, 2014), [http://news.bna.com/dlln/DLLNWB/split\\_display.adp?fedfid=57122194&vname=dlnrallissues&fcn=10&wsn=493677000&fn=57122194&split=0/](http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=57122194&vname=dlnrallissues&fcn=10&wsn=493677000&fn=57122194&split=0/) [<https://perma.cc/DY37-VZYU>]. As of July 29, 2014, the fast-food campaign had filed 181 unfair labor practice (ULP) charges against McDonald's alone. Leslie Patton, *McDonald's Told It Has Responsibility over Store Workers*, BLOOMBERG BUS. (July 29, 2014, 3:25 PM), <http://www.bloomberg.com/news/articles/2014-07-29/nlrb-determines-that-mcdonald-s-is-employer-to-franchise-workers> [<https://perma.cc/CQ3Y-4HD3>]; see also JOHANSSON, *supra* note 111 (ending “retaliation” also plays a role in OUR Walmart's demands).

448. Hsu & Semuels, *supra* note 165.

449. U.S. Serv. Indust., 315 N.L.R.B. 285, 285 (1994). Though, to be fair, the Board's evidentiary conclusion could have been the result of the employer's failure to gather facts. *Id.*

450. See, e.g., N.L.R.B., Advice Memorandum, University of Southern California, No. 31-CA-23538 (Apr. 27, 1999) (stating that five strikes in two years were “so far apart in time that it is unreasonable to say that they evidence an [intermittent] intention”).

451. Or even, on occasion, the dual-strikers. See Greenhouse, *supra* note 169 (“In some restaurants, two workers went on strike for a few hours . . .”).

streets, and why workers participating in the single instance of in-store civil disobedience for either campaign kept aisles and registers clear for commerce and customers.<sup>452</sup> The fast-food walkouts, in fact, have been so far from “crippling” that McDonald’s denies it has ever been subject to strikes.<sup>453</sup> And historian Nelson Lichtenstein, who has been critical of Walmart’s labor practices, has reflected that in participatory terms labeling OUR Walmart’s actions “strike[s] [i]s a little bit of a devaluation of the word.”<sup>454</sup> This reality also limits an argument that the Black Friday walkouts are timed to maximally damage Walmart (other than in a public relations sense), relative to, for example, gravediggers who strike unexpectedly and repeatedly at a cemetery religiously mandated to bury the dead within a day.<sup>455</sup>

As described above, other cases have used a slightly different descriptor and ask not if repeated strikes are designed to cripple but whether the motive is to “harass the company into a state of confusion.”<sup>456</sup> In this context precedent again assists improvisational campaigns. SEIU’s and UFCW’s strikes match up favorably to the chaos generated in the oft-cited *Pacific Telephone and Telegraph Company*, where employees repeatedly struck and picketed across two hundred offices over multiple days, and then returned to work just as the company’s replacement workers arrived.<sup>457</sup> In comparison, the Walmart and fast-food campaigns’ walkouts are downright orderly.<sup>458</sup>

In fact, the Board and employer advocates often pejoratively refer to intermittent strikes as “hit-and-run” or “quickie” job actions,<sup>459</sup> but one-day,

452. *See id.* Though it received almost no mainstream media coverage, on November 13, 2014, a small group of off-duty Walmart workers entered a Los Angeles location and sat on the edge of a main retail aisle holding OUR Walmart signs, their mouths taped to symbolize “the company’s attempts to silence workers.” *See* Mike Hall, *Striking Walmart Workers Stage L.A. Sit-Downs at Stores and in the Street*, AFL-CIO: NOW, (Nov. 14, 2014), <http://www.aflcio.org/Blog/Corporate-Greed/Striking-Walmart-Workers-Stage-L.A.-Sit-Downs-at-Stores-and-in-the-Street> [<https://perma.cc/AVM2-SQRX>]. After two hours they blocked a nearby intersection and were arrested. *Id.*

453. Ben Penn, *Fast Food Strikes Erupt in 150 Cities, with Hundreds of Arrests, Organizers Say*, UNION LAB. REP. NEWSL. (Sept. 4, 2014), [http://news.bna.com/dlln/DLLNWB/split\\_display.adp?fedfid=52436570&vname=dlnotallissues&wsn=494189500&searchid=27099481&doctypeid=1&ty pe=date&mode=doc&split=0&sem=DLLNWB&pg=0](http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=52436570&vname=dlnotallissues&wsn=494189500&searchid=27099481&doctypeid=1&ty pe=date&mode=doc&split=0&sem=DLLNWB&pg=0) [<https://perma.cc/Z9VV-YX3Q>] (“As in past actions, a McDonald’s statement denied the existence of strikes . . .”).

454. Eidelson, *supra* note 120.

455. This situation is described in LeRoy, *supra* note 435, at 254 n.274. *See also* Alice Hines & Kathleen Miles, *Walmart Strike Hits 100 Cities, But Fails to Distract Black Friday Shoppers*, HUFFINGTON POST (Nov. 23, 2012, 6:20 PM), [http://www.huffingtonpost.com/2012/11/23/walmart-strike-black-friday\\_n\\_2177784.html](http://www.huffingtonpost.com/2012/11/23/walmart-strike-black-friday_n_2177784.html) [<https://perma.cc/48B6-TP32>].

456. Pac. Tel. & Tel. Co., 107 N.L.R.B. 1547, 1548 (1954); U.S. Serv. Indust., 315 N.L.R.B. 285, 285 (1994).

457. Pac. Tel. & Tel. Co., 107 N.L.R.B. at 1547–51.

458. Greenhouse, *supra* note 169 (“The fast-food chains say the one-day strikes have hardly affected business.”).

459. U.S. Serv. Indust., 315 N.L.R.B. at 285; Bill McMorris, *Union Front Group Barred from Walmart*, WASH. FREE BEACON (June 4, 2014, 1:05 PM), <http://freebeacon.com/issues/union-front-group-barred-from-walmart> [<https://perma.cc/HUG5-AB4B>].

preannounced stoppages do not fit that description.<sup>460</sup> Employers can prepare by calling in replacements or revising schedules, and in 2012 Walmart had so much notice before Black Friday that it filed a widely reported NLRB charge seeking to have the actions enjoined.<sup>461</sup>

The lesson to be drawn from this discussion is that to the extent that intermittent law remains a viable doctrine, here it is ultimately a red herring. It looks and feels like a serious impediment to improvisational unionism, but closer analysis reveals that improvisational strikes should be protected.

#### CONCLUSION

The obvious question remains: where does all of this lead? The theory-based answer is as frank as it is unsatisfying: improvisation is not about outcomes, so stop asking.<sup>462</sup> Fair enough. But the fact still remains that Pizza Hut workers do not have families to feed in theory. Fifteen dollars an hour is a real-life need, and unions do not have infinite funds.

The clearest answer is that stoppages continue to “dramatize” life at the lowest end of the pay scale, helping to motivate more cities and even states to raise minimums to \$15 an hour or close to it.<sup>463</sup> If the progress stops there, it will be a big gain for workers and a storied victory for SEIU and UFCW. But without new members or new bargaining power to show for the millions of dollars spent, it would be a bounded victory, a meaningful strategic evolution minus the new math the union movement most needs long-term.<sup>464</sup>

So improvisational unionism cannot stop there. It must lead to something else. It must lead to meetings: meetings with Walmart and fast-food officials where both sides have financial and institutional incentives to give concrete things up.<sup>465</sup> That might not feel like a resolution, and it might not feel

460. The Black Friday strikes are announced weeks in advance and news articles usually herald the coming of fast-food strikes. *See supra* notes 106, 166.

461. For this reason, another marker of illegal intermittency, that short strikes are being used to avoid replacements, is not much of a stumbling block, particularly because recent decisions seem to have minimized this consideration. *See* Care Ctr. of Kan. City, 350 N.L.R.B. 64, 67 (2007) (“Clearly, the fact that the strike may have been designed to . . . provide an incentive for employees to participate . . . does not render the strike unprotected.”); Steven Greenhouse, *Labor Board to Act Swiftly on Wal-Mart’s Complaint*, N.Y. TIMES (Nov. 19, 2012), <http://www.nytimes.com/2012/11/20/business/labor-board-to-act-swiftly-on-wal-marts-complaint.html> [<https://perma.cc/7FL7-6HTK>].

462. *See* FISCHLIN ET AL., *supra* note 30, at 60 (“The underlying rule of improvisation is that attempts at categorization and definitive renderings of the limitations of improvisation as a discourse are fundamentally antithetical to the core notion of the term, both in theory and in practice.”).

463. Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1650 (2014).

464. *See* Jonathan Lange, *Why Living-Wage Laws Are Not Enough—and Minimum-Wage Laws Aren’t Either*, NATION (Nov. 25, 2014), <http://www.thenation.com/article/why-living-wage-laws-are-not-enough-and-minimum-wage-laws-arent-either> [<https://perma.cc/8EHN-QPD5>].

465. Scholars and SEIU itself have called for McDonald’s, at least, to start a formal dialogue with activists. *See* Benjamin Sachs, *A Workers Council at McDonald’s*, ONLABOR (Oct. 1, 2014), <http://onlabor.org/2014/10/01/a-workers-council-at-mcdonalds> [<https://perma.cc/8DZ2-WLJB>]; Finnegan, *supra* note 153 (describing SEIU’s envisioning of “a climactic meeting with the big fast-

significant, but it would be. It would mean that the tangible business costs of improvisational unionism have started to outweigh the perceived benefits of ignoring improvisational unionism. A tipping point would have been reached, and it would all start with a UFCW coffee date in Bentonville or an executive assistant leading SEIU through McDonald's Oak Brook executive suites.

What unions might ask for in the meetings is impossible to predict. Signing on to improv means accepting "an openness to unexpected outcomes, to developing themes or ideas that might not have been predicted on the basis of any one participant's starting point," and what could be demanded with legitimacy is surely a function of improvisation's spread by that time.<sup>466</sup> So if what has gone on since September 2012 is something like a "Phase One" attempt to seed improvisation among low-wage workers, actually asking Walmart, Burger King, and the others to, say, let organizers hang out in break rooms would probably require something like a "Phase Three." In terms of the endgame, the most significant questions may therefore surround what a Phase Three might look like. Here, the answer is singular, unavoidable, and in many ways the point from the very start: who knows?

That might feel like a cop-out, but it's not. It's just improv.

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food employers"); *see also* Greenhouse, *supra* note 190 ("The SEIU is exerting all this pressure . . . in the hope of getting McDonald's (and perhaps other fast-food companies) to sit down and talk. . . . In April, the SEIU's president, Mary Kay Henry, said, 'We will see as the movement grows how we can get these employers to the table.'").

466. FISCHLIN ET AL., *supra* note 30, at xii.